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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BARRY DEAN MICHAEL,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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July 10, 1981

QUESTION PRESENTED FOR REVIEW

1. DOES THE WARRANTLESS INSTALLATION BY TRESPASS AND SUBSEQUENT MONITORING OF AN ELECTRONIC TRACKING "BEEPER" ON DEFENDANT'S VEHICLE, WITHOUT EXIGENT CIRCUMSTANCES AND BASED ON NO MORE THAN "REASONABLE SUSPICION" THAT HE WAS COMMITTING A DRUG CRIME, VIOLATE HIS FOURTH AMENDMENT RIGHTS?

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*The caption contains the names of all parties.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Barry Dean Michael prays that a writ of certiorari issue to review the decision and order (en banc) of the United States Court of Appeals for the Fifth Circuit entered in this case on May 11, 1981.

OPINIONS BELOW

The opinion (en banc) of the Court of Appeals, reported at 645 F.2d 252 (1981), is reproduced as Appendix A. The earlier panel opinion, vacated by the en banc decision, is reported at 622 F.2d 744 and reproduced as Appendix B. The judgment of the District Court adopting the Magistrate's Report and Recommendation, is unreported and is reproduced as Appendix C. The Magistrate's Report and Recommendation is reproduced as Appendix D.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) authorizing the grant of a writ of certiorari to a United States Court of Appeals upon the petition of a party to a criminal case after rendition of judgment. The judgment of the Court of Appeals for the Fifth Circuit was entered May 11, 1981. A stay of mandate until July 3, 1981 to permit the filing of this petition was granted on June 3, 1981. The stay of mandate was extended to July 10, 1981 by order of the court filed June 30, 1981.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On August 10, 1978 defendant Michael picked up from a chemical supply house a drum of acetone, a "very common solvent" (R.2, 154), that can be used in the manufacture of methylenedioxyamphetamine (MDA), under circumstances characterized by the court below as indicating "reasonable suspicion" that he might be engaged in the illegal manufacture of drugs.[1] Drug Enforcement Administration (DEA) agents visually followed for a

[1] As not unusual in warrantless search situations being reviewed nearly a year later in a motion to suppress hearing, the principal case agent, Sweat, couldn't remember exactly when he learned which facts "because there's very close timing here" (R.2, 50).

short while the van into which defendant loaded the acetone and then attached by magnets an electronic tracking "beeper" to the underside of the vehicle while it was parked in a public parking place.[2]

The agents had been advised just prior to August 10 that a "Mike Thompson," who could be suspected to be connected with an MDA operation, had made an acetone purchase. When "Mike Thompson" called in another acetone order on August 10 about lunch time (R.2, 44) they were alerted and set up surveillance. Defendant Michael made the pick-up in the van rented by him and the agents installed the beeper on it "late in the afternoon" (R.2, 47). They made no effort by radio, telephone or otherwise, before or after installing the beeper, to get a search warrant. The decision to install the beeper without a warrant was made by the agents in consultation with the U.S. Attorney's office (R.2, 79-80). Agent Sweat said, "a warrant is not required in most judicial districts" (R.2, 52). The beeper was still functioning when it was removed approximately three weeks later.

After installing the beeper, the agents followed defendant to an airport where he flew a plane for several hours "into the late evening" (R.2, 31). It was "getting about dark then" (R.2, 82). From the airport, and by use of the beeper (R.2, 75, 83), they tracked him to his house. Four days later—and the case agent had a very sketchy memory [3] of where the van was followed in the interim—

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[2] The beeper was installed to avoid losing sight of the van in rush hour traffic and also to avoid the possibility of the surveillance being detected (R.2, 123).

[3] R.2, 34. See also R.2, 83: "Q. Where did he go in that intervening time? A. I don't recall." The main majority opinion indicates defendant was only followed on "public roads during the daytime" (A-12a).

defendant was tracked to a warehouse. Over a period of time, and using information obtained from checking on matters learned by the surveillance, the DEA agents obtained search warrants and entered the storage area three times where chemicals and equipment, some with MDA residue, were found.

The magistrate and district court,[4] finding there were no exigent circumstances to make the warrantless installation, granted defendant's motion to suppress without going into all the contentions advanced by defendant. The panel of the Fifth Circuit that initially considered the government's appeal of the suppression order upheld the order, and the government sought and obtained an en banc rehearing. In that proceeding the court split fifteen to nine, writing five opinions, to reverse the decisions below. None of the opinions claims that there were exigent circumstances.

Several of the judges concurring in the majority position were of the opinion that the beeper installation was not a search or seizure and hence did not implicate Fourth Amendment rights at all. The main majority opinion, not rejecting this view, said it was "difficult to classify the actions taken by the DEA agents in this case as either a search or seizure," but did an analysis as "if we assume the installation was a search."[5] Applying a "dual privacy and intrusiveness analysis," the majority held that "the minimal intrusion involved in the attachment of a beeper

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[4] The magistrate and trial judge relied on the Fifth Circuit decision in *United States v. Holmes*, an earlier beeper case where the trial court and a panel of the Fifth Circuit, 521 F.2d 859 (1975), held a warrantless installation to violate the Fourth Amendment. In an en banc rehearing the Fifth Circuit split eight to eight on the question, 537 F.2d 227 (1976).

[5] A-10a, footnote 11.

to Michael's van, parked in a public place, was sufficiently justified" in this case.[6]

While the nine judges who dissented agreed substantially with each other, one dissenting opinion emphasized the continuing trespass on the property interest of defendant by the installation and monitoring of the beeper while the other emphasized the intrusion on defendant's privacy expectations. Both the main majority opinion and the dissents emphasize the confusion among the lower courts in regard to the warrantless installation of beepers.

REASONS FOR GRANTING THE WRIT

THE DECISIONS OF THE COURTS OF APPEAL AND OF THE STATE COURTS WHICH HAVE PASSED ON THE QUESTION OF WARRANTLESS INSTALLATION OF BEEPERS ARE IN TOTAL DISCORD AND THIS COURT HAS NOT PASSED ON THE MATTER.

A. The Lower Courts, Including The Federal Courts Of Appeal, Have Rendered Directly Conflicting Decisions And The En Banc Decision Below Conflicts With All of Them.

As noted in the main majority opinion below,[7] "the other circuits have reached widely varying results for determining the proper standard for the warrantless use of a beeper." The dissent of Judge Tate [8] says:

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[6] A-10a.

[7] A-11a.

[8] A-17a-18a. Judge Tate also says his analysis shows "how radically different is the majority's approach from that of every circuit that has approached it" (A-22a).

> The majority—contrary to every circuit that has considered the issue—has determined that executive agents of the government may, without legislative or judicial authorization, ignore an individual's proprietary or possessory interest in his own property under circumstances self-determined by the executive agents, as affording them reasonable suspicion that their trespass might lead them to information of law violation.

In his dissent, Chief Judge Godbold [9] says:

> The standard that reasonable suspicion of criminal activity is a justification for a warrantless search is newly created in this case. No case is cited to support it. . . . Sitting in en banc we have the power to create this rule subject to Supreme Court review. But there should be some better basis than the mischaracterization of the intrusion as a nickel and dime trespass, and the fact that the police were trying to catch illegal drug manufacturers.

Judge Tate, who wrote the panel decision upholding the motion to suppress, summarized the views and holdings of the other circuits (622 F.2d at 747-748, B-8b-10b). In his dissent in the en banc consideration below [10] he further explicates these cases:

> With regard to the *initial placement* of the beeper on a vehicle or other private property, however, only one circuit (the First) has held that no warrant is required for installation upon a *vehicle*; but nevertheless that circuit requires the existence of probable cause as a prerequisite for installation of the beeper. *United States v. Moore*, 562 F.2d 106 (1st Cir. 1977) (holding additionally, however, that a warrant with probable cause is required to insert a beeper in a *container* to be carried into a home).

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[9] A-46a.

[10] A-25a-27a.

No circuit has held that reasonable suspicion alone may justify the installation of a beeper on private property without the consent of a person with proprietary or possessory interest therein. *All* circuits other than the First that have touched upon the issue (the Sixth, the Eighth, the Ninth, and the Tenth) have either expressly held that a warrant is required for attachment of a beeper, *United States v. Bailey*, 628 F.2d 938 (6th Cir. 1980), or have so considered (sometimes reserving the issue), in circumstances arising when evidence obtained through electronic surveillance has been admitted either because judicial authorization for the installation had first been secured before placement of the beeper, *United States v. Chavez*, 603 F.2d 143 (10th Cir. 1979), *United States v. Pretzinger*, 542 F.2d 517 (9th Cir. 1976); or else because either both probable cause and exigent circumstances justified placement of the beeper or else the initial placement on the property was made with the consent of a person with a proprietary or possessory interest in the property at the time of the placement (findings unnecessary to make, if indeed no warrant is required).

See: Eighth Circuit: United States v. Bruneau, 594 F.2d 1190 (1979) (consent); *United States v. Frazier*, 538 F.2d 1322 (1976) (probable cause plus exigent circumstances); *Ninth Circuit: United States v. Bernard*, 625 F.2d 854 (1980) (consent); *United States v. Dubrofsky*, 581 F.2d 208 (1978) (consent); *United States v. Miroyan*, 577 F.2d 489 (1978) (consent); *United States v. Curtis*, 562 F.2d 1153 (1977) (consent); *United States v. Hufford*, 539 F.2d 32 (1976); *Tenth Circuit: United States v. Clayborne*, 584 F.2d 346 (1978) (consent); *United States v. Shovea*, 580 F.2d 1382 (1978) (probable cause plus exigent circumstances).

In *Dunivant v. State*, 155 Ga. App. 884 (1980), *cert. denied*, ____Ga. ____; *cert. denied*, ____U.S. ____, the

Georgia Court of Appeals upheld the denial of a motion to suppress where a beeper was placed without warrant in a box of chemicals at a supply house before delivery. But the court did say (at 889):

> Our belief might be tempered somewhat by a case in which it is shown that there are no exigent circumstances, probable cause exists, but a trespass is involved. In such a case, perhaps a weighing by an impartial magistrate might be required to protect the invasion involved in the trespass. Such seems to be an underlying caveat in the federal cases above considered. However . . . the present case did not involve a trespass.

In a North Carolina case, *State v. Hendricks*, 43 N.C. App. 245, 258 S.E.2d 878 (1979), the court, while upholding a "search" resulting from the placement of a beeper in a canister of chemicals delivered into a home because a warrant had previously been obtained, stated the following:

> We stress that the presence of a beeper on one's person, in one's personal effects, in one's vehicle, or in one's home, is not a minimal intrusion. The presence of a beeper, in effect, transforms private property into an instrument of surveillance, a surrogate police presence, a use unintended by the original owner. Moreover, the continuing presence of the beeper is not a mere technical trespass, but an extended physical intrusion: they continually broadcast the message, "Here I am." In sum, these "uninvited shadowers" pierce one's privacy of location and movement, as well as one's rights to protection of property against physical invasion.

B. This Court Has Not Passed On The Requirements For Beeper Installation And Analogous Decisions Of The Court Are Being Quoted By Both Sides [11] To Justify Contrary Results.

The main majority opinion below states,[12] "The panel opinion relied on 'pre-*Katz* [13] jurisprudence' to find that the attachment of the beeper without the consent of someone with a possessory interest in the van was a search. . . . However, as we have pointed out, analysis of search and seizure cases in terms of property law has now been replaced by reasonable expectation of privacy analysis."[14] On the other hand, Judge Tate's dissent points out that *Katz* has not done away with property concepts in search and seizure, nor has *Rakas v. Illinois*, 439 U.S. 128 (1978):

> *Katz*, as previously noted (see note 4 *supra*), disregarded ancient niceties of tort or property law to hold that, *despite* the absence of a trespass (the previous determinant of a Fourth Amendment violation), a person in a telephone booth had a reasonable expectation of privacy against electronic eavesdropping. It was not intended to and it did not alter the basic Fourth Amendment protection against trespassatory searches of private property by governmental agents, a basic concept not intended to be altered by *Rakas* (see below) insofar at least as trespassatory searches complained of by a defendant with a possessory or proprietary interest in the prop-

[11] It would be an understatement to say that there is a split in authority regarding beeper installations. There is a splinter.

[12] A-10a.

[13] *Katz v. United States*, 389 U.S. 347 (1967).

[14] Judge Tate's dissent criticized the total reliance on expectation of privacy as being "based in the ultimate on the judge's subjective views" (A-20a). Defendant doubts that a poll would establish that people reasonably expect to be doggedly followed through dark and fog for an undetermined period by police officers who are merely suspicious of drug activities. Let us not forget that DEA agents have sometimes followed innocent people and broken into their homes. Only those caught violating the law generally end up in court.

erty searched. See also original panel opinion, 622 F.2d at 749-51.

* * *

Rakas, of course, is the primary authority for the majority's view.

* * *

Rakas may be authority for the proposition that one *without* a possessory or proprietary interest in property search has no reasonable expectation of privacy that is offended. It is simply not authority for the non sequitur that one *with* property interest likewise had no reasonable expectation of privacy. And, indeed, *Rakas* went to pains to state the contrary quite plainly.

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blackstone, Commentaries, Book II Ch. I, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.

In considering an application for stay of mandate in *Miroyan v. United States*, 439 U.S. 1338 (1978), Justice Rehnquist, while denying the stay in that particular case, observed that "there is undoubtedly a difference of approach between the circuits" on the lawfulness of the non-trespassing installation of beepers. He pointed out that the circuit court decision in *Miroyan* "and the decisions with which applicants claim it is in conflict used *Katz v. United States* . . . as their point of departure." He

further observed "that in all probability this Court may eventually feel bound to decide whether Government agencies must have probable cause to install tracking devices on motor vehicles or in articles subsequently used in a criminal enterprise when the installation is expressly authorized by the owner of the vehicle or article." How much more necessary is a clarifying decision when, as in the instant case, the initial installation is by trespass?[15]

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[15] Though not necessary to prevail in his argument here, defendant would submit that it is an unwarranted fiction to hold that there is no trespass when a lawful purchaser or lessee takes over an item in which a beeper is secreted. What if a conversation-transmitting device were installed? And what has happened to the doctrine of continuing trespass?

CONCLUSION

The law in the different lower court jurisdictions regarding installation of beepers is in total confusion. Some judges—including a faction of the en banc court majority in the instant case—believe that no Fourth Amendment rights are implicated and hence that no prior or subsequent judicial supervision is required. Other judges have insisted that probable cause and a warrant or exigent circumstances are necessary. Some judges think no warrant is needed for installing a beeper used to follow a suspect in daylight on the public roads but that a warrant is needed if the beeper goes into enclosed private property. Others say probable cause without a warrant is enough. And of course the main opinion in the case below says reasonable suspicion without a warrant is sufficient. In some cases where a warrant was obtained but no time limit set on the surveillance, courts have invalidated the warrant. The majority opinion below requires no time limit.

The use of beepers, as the reported cases indicate, is on the increase. This Court must settle the issue, and the instant case is a good vehicle for doing so. Certiorari should be granted and the case set for full briefing and oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served three copies of the within and foregoing Petition for Writ of Certiorari upon the Solicitor General, U.S. Department of Justice, Washington, D.C. 20053; and upon the U.S. Attorney, 75 Spring Street, Atlanta, Georgia 30303, by depositing same in the United States Mail in properly addressed envelopes with adequate postage thereon. I further certify that all parties required to be served have been served.

This the ____ day of July, 1981.

ALBERT M. HORN

APPENDICES

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellant,

v.

Barry Dean MICHAEL, a/k/a Mike Thompson,
a/k/a Mike Johnson,
Defendant-Appellee.

No. 79-2679.

United States Court of Appeals,
Fifth Circuit.

May 11, 1981.

The United States District Court for the Northern District of Georgia granted defendant's motion to suppress evidence seized, pursuant to a warrant, from a warehouse discovered by DEA agents through the warrantless installation of a beeper on the exterior of a van which defendant had rented, and United States appealed. The Court of Appeals, 622 F.2d 744 affirmed, and Court of Appeals voted to rehear the case en banc, thus vacating panel opinion. On rehearing en banc, the Court of Appeals, Ainsworth, Circuit Judge, held that (1) reasonable suspicion that defendant was involved in illicit manufacture of MDA was adequate to support warrantless beeper installation, and (2) in view of fact that defendant's legitimate expectation of privacy with respect to movements of his automobile on public roads during the daytime was slight, in view of minimal intrusiveness involved in DEA agents' placing electronic tracking device on outside of defendant's vehicle while it was parked in a public place, and in view of governmental interests in eliminating illegal drug manufacture, installation and

monitoring of beeper in an effort to discover defendant's drug manufacturing apparatus involved no violation of defendant's Fourth Amendment rights.

Reversed.

Brown, Circuit Judge, filed a concurring opinion.

Charles Clark, Circuit Judge, with whom Gee, Tjoflat, James C. Hill, Henderson, and Reavley, Circuit Judges, joined, specially concurred and filed opinion.

Tate, Circuit Judge, with whom Kravitch, Frank M. Johnson, Jr., Politz, Hatchett, Randall, Thomas A. Clark and Jerre S. Williams, Circuit Judges joined, filed a dissenting opinion.

Godbold, Chief Judge, with whom Kravitch, Frank M. Johnson, Jr., Politz, Hatchett, Randall, Tate, Thomas A. Clark, and Jerre S. Williams, Circuit Judges, joined, filed a dissenting opinion.

1. Searches and Seizures 7(1)

Fourth Amendment protects individuals from violations of their legitimate or reasonable expectations of privacy. U.S.C.A.Const. Amend. 4.

2. Searches and Seizures 3.2

At time electronic tracking device, or "beeper" was attached to exterior of defendant's vehicle parked in a public place, Drug Enforcement Administration agents had reasonable suspicion that defendant was engaged in criminal activity, where they had been told that defendant and another person believed to be manufacturing MDA were associated and agents knew that defendant had purchased chemicals consistent with manufacture of MDA on several occasions, and thus warrantless attachment of

beeper to defendant's van was justified. U.S.C.A.Const. Amend. 4.

3. Searches and Seizures 7(10)

Reasonable suspicion is adequate to support warrantless installation of electronic tracking device, or "beeper." U.S.C.A.Const. Amend. 4.

4. Searches and Seizures 7(10)

An individual's expectation of privacy in his automobile is less than in other property. U.S.C.A.Const. Amend. 4.

5. Searches and Seizures 7(10)

Where defendant's van was parked in plain view in a public place when electronic tracking device, or "beeper" was installed and defendant drove van on public roads during the daytime, defendant's legitimate expectation of privacy with respect to movements of his automobile was substantially reduced since defendant, in driving on public roads, was disclosing his van's whereabouts to all law enforcement officials who cared to observe. U.S.C.A. Const. Amend. 4.

6. Searches and Seizures 7(10)

Monitoring of electronic tracking device or "beeper" by Drug Enforcement Administration officials after device was installed on outside of defendant's van did not violate defendant's reasonable expectation of privacy since beeper only aided agents in the performance of their lawful surveillance of van, which travelled public roads and was exposed to public view and since DEA agents had reasonable suspicion to believe that defendant was conspiring to manufacture MDA. U.S.C.A.Const. Amend. 4.

7. Searches and Seizures 7(10)

Governmental interest in eliminating criminal conduct may properly be balanced against individual's privacy interest in Fourth Amendment cases. U.S.C.A.Const. Amend. 4.

8. Searches and Seizures 7(10)

In view of fact that defendant's legitimate expectation of privacy with respect to movements of his automobile on public roads during the daytime was slight, in view of minimal intrusiveness involved in DEA agents' placing electronic tracking device on outside of defendant's vehicle while it was parked in a public place, and in view of governmental interests in eliminating illegal drug manufacture, installation and monitoring of beeper in an effort to discover defendant's drug manufacturing apparatus involved no violation of defendant's Fourth Amendment rights. U.S.C.A.Const. Amend. 4.

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, and BROWN, AINSWORTH, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAMUEL D. JOHNSON, THOMAS A. CLARK, and JERRE S. WILLIAMS, Circuit Judges.*

*Coleman, Circuit Judge, elected not to participate in the consideration or decision of this appeal.

AINSWORTH, Circuit Judge:

This criminal prosecution requires us to determine the appropriate standard for the warrantless installation of an electronic tracking device (a "beeper") on the exterior of a vehicle parked in a public place. The question remains one of first impression for this circuit because of our equally divided vote when considering the same issue in *United States v. Holmes*, 537 F.2d 227 (5th Cir. 1976) (*en banc*); *see id.* at 228 (Ainsworth, J., dissenting). As in *Holmes*, this case was placed *en banc* because of its exceptional importance.[1]

Defendant-appellee Barry Dean Michael was indicted on two counts: unlawfully manufacturing and possessing with the intent to distribute a Section II Controlled Substance, methylenedioxyamphetamine (MDA), and conspiring to distribute MDA in violation of 21 U.S.C. §§ 841(a)(1) & 846. Michael moved to suppress certain evidence as unconstitutionally seized. The district court, relying on the panel opinion in *Holmes*,[2] granted Michael's motion to suppress with respect to evidence seized from a warehouse pursuant to a warrant, but which DEA agents had discovered through the warrantless installation of a beeper on the exterior of a van which Michael had rented. R. at 118-120. A panel of this court, replying both on its independent analysis and on the *Holmes* panel

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[1] Fed.R.App.P. 35(a); Fifth Circuit Local Rule 16.2.4.

[2] It was error for the district judge to follow the panel opinion in *United States v. Holmes*, 521 F.2d 859 (5th Cir. 1975), as precedent. The court's vote to put *Holmes en banc* vacated the panel opinion. *See* Local Rule 17. A vacated judgment leaves the case as if no decision had been entered. *See, e. g., Lantz v. Vai*, 199 Val. 190, 193, 248 P. 665, 665 (1926); *Clarke v. Baird*, 98 Cal. 642, 644, 33 P. 756, 756-57 (1893); *In re Edwards*, 25 Cal.App.3d 906, 912, 102 Cal.Rptr. 216, 220 (2d Dist. 1972); *Adelhelm v. Dougherty*, 129 Fla. 680, 683, 176 So. 775, 777 (1937); *Talley v. Alton Box Board Co.*, 37 Ill.App.2d 137, 138, 185 N.E.2d 349, 350 (4th Dist. 1962); *Luck v. Hopkins*, 92 Tex. 426, 428,

opinion,[3] affirmed the district court. *United States v. Michael*, 622 F.2d 744 (5th Cir. 1980). The court voted to rehear this case *in banc*, *United States v. Michael*, 628 F.2d 931 (5th Cir. 1980), thus vacating the panel opinion. *See* Fifth Circuit Local Rule 17. We reverse the judgment of the district court.

I. THE FACTS

In early 1978, an employee of Scientific Products, a chemical supply house in Atlanta, Georgia, notified Drug Enforcement Administration (DEA) agents that Andrew Welch was purchasing large quantities of glassware and equipment of the type used in clandestine drug laboratory operations. Upon further investigation, a team of agents led by Agent James Sweat learned that Welch was also purchasing chemicals from Burris Chemical Company in Atlanta. In particular, they discovered that Welch had purchased a barrel of acetone and a barrel of formic acid in December 1977. Both acetone and formic acid can be used to manufacture MDA.

On August 8, 1978, an employee of Burris Chemical Company notified the DEA that a "Mike Thompson" had purchased a large quantity of acetone, 20 gallons, that day and had made several previous purchases. About the same time, Agent Sweat learned that "Mike Thompson" had returned the empty acetone drum from Welch's December 1977 purchase and had directed the deposit be sent to Welch. Also early in August, Burris employees

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49 S.W. 360, 361 (1899); *Sawyer v. Donley County Hosp. Dist.*, 513 S.W.2d 106, 109 (Tex.Civ.App.—Amarillo 1974, no writ); 49 C.J.A. *Judgments* § 306 (1947). *United States v. Conroy*, 589 F.2d 1258, 1263 (5th Cir. 1979), is not to the contrary.

[3] The panel in *Michael* independently adopted the reasoning of the *Holmes* panel and did not view *Holmes* as precedent. *See United States v. Michael*, 622 F.2d 744, 744 n.1 (5th Cir. 1980).

told Agent Sweat that on July 20 Welch had purchased some muriatic acid, another chemical used in the manufacture of MDA.[4] At this time, Agent Sweat told the Burris employee to let Sweat know if "Mike Thompson" ever ordered any more chemicals.

At lunch time on August 10, the Burris employee contacted Agent Sweat to tell him "Mike Thompson" had ordered another drum of acetone and that "Thompson" usually picked up his order within the hour. Agent Sweat and his partner arrived at Burris before "Thompson" and saw "Thompson" load the acetone into a van.[5] The agents followed the van by visual surveillance until "Thompson" parked in a lot adjoining a pizza restaurant and went inside. While "Thompson" was inside the restaurant, Agent Sweat's partner, Agent Smith, installed a beeper on the exterior of the van without first obtaining a warrant.

Further investigation by the DEA established that "Mike Thompson" was an alias used by appellee Barry

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[4] In late July, the DEA agents also learned that Janice Christie had been arrested by the Georgia Bureau of Investigation for possession of one pound of MDA (R. vol. II at 23-24). The vehicle Christie was driving was registered to Andrew Welch. Inside the vehicle, GBI agents found a receipt for 500 pounds of iso-safrole, another chemical used to make MDA, made out to "Mike Johnson." Later investigation revealed that "Johnson" was an alias of appellee Michael.

Although Agent Sweat stated that on August 10 he had not connected Michael with the purchase of iso-safrole (R. vol. II at 76), the GBI arrest of Christie, of which the DEA agents were aware, supports the agents' belief that Welch and his associates were engaged in the manufacture of MDA.

[5] After observing a man believed to be "Mike Thompson" pick up some chemicals at Burris, Agent Sweat's partner, Agent Smith, radioed the DEA office and had the operator call Burris Chemical Company to make sure the individual was "Mike Thompson." R. vol. II at 127-28.

Dean Michael. Subsequent monitoring of the beeper placed on Michael's van ultimately led the DEA agents to a warehouse where, pursuant to a warrant, they seized the chemicals, equipment, and quantities of MDA which are the subject of Michael's suppression motion.

II. THE LAW

[1] We look to the fourth amendment to determine whether the facts in this case, as related above, provide a sufficient basis for the warrantless installation of a beeper on Michael's van. The fourth amendment, in pertinent part, protects people's "persons, houses, papers, and effects, against unreasonable searches and seizures." Although originally viewed as protecting property rights of individuals, the Supreme Court has now rejected the idea that fourth amendment coverage turns on "arcane distinctions developed in property . . . law." *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978). Instead, the fourth amendment protects individuals from violations of their legitimate or reasonable expectations of privacy. *See id.; Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring); *Jones v. United States*, 357 U.S. 493, 498, 78 S.Ct. 1253, 1256, 2 L.Ed.2d 1514 (1958). Expectation of privacy analysis is especially appropriate in cases like the instant one which involve an individual's rights with respect to an automobile.[6] In *Cardwell v.*

[6] The circuits that have considered the permissibility of installing beepers have used a privacy analysis. *See, e. g., United States v. Bailey*, 628 F.2d 938, 940 (6th Cir. 1980) (petition for rehearing pending); *United States v. Bernard*, 625 F.2d 854, 860 (9th Cir. 1980); *United States v. Bruneau*, 594 F.2d 1190, 1196 (8th Cir.), *cert. denied*, 444 U.S. 847, 100 S.Ct. 94, 62 L.Ed.2d 61 (1979); *United States v. Washington*, 586 F.2d 1147, 1157 (7th Cir. 1978); *United States v. Clayborne*, 584 F.2d 346, 348 (10th Cir. 1978); *United States v. Moore*, 562 F.2d 106, 110 (1st Cir. 1977).

Lewis, 417 U.S. 583, 591, 94 S.Ct. 2464, 2470, 41 L.Ed.2d 325 (1974) (plurality opinion), Justice Blackmun stated, "[I]nsofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry."

In addition, fourth amendment cases have recognized that the degree of intrusion into a suspect's privacy is relevant in deciding whether any of the suspect's constitutional rights have been infringed. Thus, "intrusions into the human body," because of their extremely invasive nature, require more justification to satisfy the fourth amendment,[7] than does a limited stop and frisk.[8] Likewise, the ransacking of a suspect's house in search of evidence requires more justification for the intrusion [9] than does the examination of a suspect's automobile to discover its vehicle identification number.[10] Applying this

[7] *Schmerber v. California*, 384 U.S. 757, 770, 86 S.Ct. 1826, 1835, 16 L.Ed.2d 908 (1966) (warrant supported by probable cause).

[8] *Terry v. Ohio*, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968); *id.* at 33, 88 S.Ct. at 1886 (Harlan, J., concurring) (reasonable "articulable suspicion"). *See Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972). This circuit has recognized that whether something less than probable cause may justify a search depends in part on the intrusiveness of that search. In *United States v. Afanador*, 567 F.2d 1325, 1328 (5th Cir. 1978), we said, "Thus, what constitutes 'reasonable suspicion' to justify a particular search may not suffice to justify a more intrusive or demeaning search." *See also United States v. Smith*, 557 F.2d 1206, 1209 n.6 (5th Cir. 1977), *cert. denied*, 434 U.S. 1073, 98 S.Ct. 1259, 55 L.Ed.2d 777 (1978); *United States v. Himmelwright*, 551 F.2d 991, 994 (5th Cir.), *cert. denied*, 434 U.S. 902, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977).

[9] *Payton v. New York*, 445 U.S. 573, 589-90, 100 S.Ct. 1371, 1381-82, 63 L.Ed.2d 639 (1980) (warrant supported by probable cause). *See Lewis v. United States*, 385 U.S. 206, 210, 87 S.Ct. 424, 427, 17 L.Ed.2d 312 (1966).

[10] *United States v. Johnson*, 431 F.2d 441 (5th Cir. 1970) (*en banc*) (no warrant or probable cause necessary). *See South Dakota v. Opperman*, 428 U.S. 364, 367, 96 S.Ct. 3092, 3096, 49 L.Ed.2d 1000 (1976); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561, 96 S.Ct. 3074, 3084-85, 49 L.Ed.2d 1116 (1976).

dual privacy and intrusiveness analysis to the facts of the instant case, we hold that the minimal intrusion involved in the attachment of a beeper to Michael's van, parked in a public place, was sufficiently justified so as to satisfy any of Michael's fourth amendment expectation of privacy concerns.

III. APPLICATION

We note that some members of the majority would hold that the installation of the beeper on the van is not a search and seizure at all, and thus does not implicate any fourth amendment interests. While we do not reject this view, we feel that under the facts presented, the installation of the beeper was permissible even if we assume the installation was a search.[11]

[2, 3] The facts known to the DEA agents at the time they placed the beeper were enough to give them a reasonable suspicion that Michael was engaged in criminal activity. That is to say, specific and articulable facts, together with rational inferences from those facts, reasonably warranted the agents in the belief [12] that Michael was involved in the illicit manufacture of MDA. The agents had been told that Michael and Welch were asso-

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[11] It is difficult to classify the actions taken by the DEA agents in this case as either a search or seizure. *See United States v. Bailey*, 628 F.2d 938, 940 (6th Cir. 1980). The panel opinion relied on "pre-*Katz* jurisprudence" to find that the attachment of the beeper without the consent of someone with a possessory interest in the van was a search. *United States v. Michael*, 622 F.2d 744, 749 (5th Cir. 1980). However, as we have pointed out, analysis of search and seizure cases in terms of property law has now been replaced by reasonable expectation of privacy analysis. *See* note 5, *supra*, and accompanying text.

[12] *See Brown v. Texas*, 443 U.S. 47, 51, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979); *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968); *United States v. Cimino*, 631 F.2d 57, 59 (5th Cir. 1980).

ciated. The agents had probable cause to believe Welch was manufacturing MDA, *United States v. Michael*, 622 F.2d 744, 745 n.4 (5th Cir. 1980), and the agents knew Michael had purchased chemicals consistent with the manufacture of MDA on several occasions. We are supported in our view that the facts establish reasonable suspicion in light of the panel's similar conclusion. *Id.* However, the district court found, "The evidence that was seized from the warehouse was the product of an unlawful search and therefore subject to exclusion," (R. at 118) since the DEA agents obtained no warrant to install the beeper which led them to the evidence. Likewise, the panel would have allowed warrantless use of the beeper only if both probable cause and exigent circumstances existed. *United States v. Michael*, *supra* at 752. We disagree with the district court and the panel and hold that reasonable suspicion is adequate to support warrantless beeper installation.[13]

[13] The other circuits have reached widely varing results for determining the proper standard for the warrantless use of a beeper. The Ninth Circuit analyzes the installation and the monitoring of the beeper separately. Some Ninth Circuit cases have held that neither installation nor monitoring infringes a privacy interest, *United States v. Pretzinger*, 542 F.2d 517, 520 (9th Cir. 1976); *United States v. Hufford*, 539 F.2d 32, 34 (9th Cir.), *cert. denied*, 429 U.S. 1002, 97 S.Ct. 533, 50 L.Ed.2d 614 (1976). Another has held that installation might "violate fourth amendment precepts," *United States v. Miroyan*, 577 F.2d 489, 492 (9th Cir.), *cert. denied*, 439 U.S. 896, 99 S.Ct. 258, 58 L.Ed.2d 243 (1978).

The Sixth Circuit appears to require nothing less than a warrant, at least for the attachment and monitoring of beepers on goods. *United States v. Bailey*, 628 F.2d 938 (6th Cir. 1980). *But see id.* at 942, 947 (may be no expectation of privacy as to public travels of a vehicle). The First Circuit ostensibly requires probable cause, although the court left open the possibility of a "reasonable cause" standard. *United States v. Moore*, 562 F.2d 106, 113 n.3 (1st Cir. 1977), *citing United States v. Holmes*, 537 F.2d 227, 228 (5th Cir. 1976) (*en banc*) (Ainsworth, J., dissenting). The holdings of the other circuits are discussed in *United States v. Michael*, 622 F.2d 744, 747-48 (5th Cir. 1980).

A. Privacy

[4, 5] First, as we have said, Michael's fourth amendment rights in this case turn upon his reasonable expectations of privacy. However, search and seizure cases involving vehicles have recognized that an individual's expectation of privacy in his automobile is less than in other property. The Supreme Court has stated:

> But this Court has recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts.
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> . . . .
>
> The answer lies in the diminished expectation of privacy which surrounds the automobile. . . .

United States v. Chadwick, 433 U.S. 1, 12, 97 S.Ct. 2476, 2484, 53 L.Ed.2d 538 (1977); *see also United States v. Foskey*, 636 F.2d 517 (D.C. Cir. 1980). In this case, Michael's van was parked in plain view, in a public place. Michael drove the van on public roads during the daytime. As the Supreme Court said in *Cardwell:*

> A car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants and its contents are in plain view. [citation omitted] "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S., at 351, 88 S.Ct., at 511; *United States v. Dionisio*, 410 U.S. [1] at 14, 93 S.Ct. [764] at 771 [35 L.Dd.2d 67].

417 U.S. at 590-91, 94 S.Ct. at 2469-70. As the cases demonstrate, Michael's legitimate expectation of privacy with respect to the movements of his automobile was

substantially reduced.[14]

B. Intrusiveness

Second, the intrusion occasioned by the placement of the beeper was not great. Although the attachment was technically a trespass, "arcane distinctions developed in property . . .law" are not controlling. The Supreme Court has permitted the removal of paint scrapings from the exterior of an automobile, observing "[W]e fail to comprehend what expectation of privacy was infringed. Stated simply, the invasion of privacy, 'if it can be said to exist, is abstract and theoretical.' *Air Pollution Variance Board v. Western Alfalfa Corp.*, 416 U.S. 861, 865, 94 S.Ct. 2114, 2116, 40 L.Ed.2d 607 (1974)." *Cardwell v. Lewis*, 417 U.S. at 591-92, 94 S.Ct. at 2470 (1974). Similarly, this court, sitting *en banc*, has allowed police officers without

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[14] The Government argues with considerable cogency that this case is governed by *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). In that case the Supreme Court held that installation and use of a pen register at the telephone company's central office to record the numbers dialed by the defendant was not a search and violated no expectation of privacy. *Id.* at 743, 99 S.Ct. at 2581. The Court reasoned that since telephone users convey numerical information to the phone company which can be permanently recorded, they have no reasonable expectation that the phone company would not disclose those numbers to the police. *Id.* at 744, 99 S.Ct. at 2581-82.

The reasoning in the instant case is even more straightforward; no two-step disclosure is required. In driving on public roads, Michael was disclosing his van's whereabouts directly to all law enforcement officials who cared to observe. The beeper, like the pen register in *Smith*, facilitated such observation. That the beeper required the DEA agents to make a technical trespass unlike the pen register in *Smith* is not controlling. This slight physical intrusion is insignificant if it infringes no *privacy* interest. Thus, although we do not necessarily adopt the reasoning in *Smith* so completely as to find that the attachment and use of the beeper was free from fourth amendment concerns, we recognize that under *Smith*, Michael's expectation of privacy in this case was slight.

warrants to open vehicle doors to determine the correct identification numbers on the side panel. *United States v. Johnson*, 431 F.2d 441 (5th Cir. 1970) (*en banc*).

[6] We find that the DEA agents' reasonable suspicion that Michael was engaged in criminal activity justified the placement and monitoring of the beeper. The actual installation of the beeper was much less intrusive than the typical stop and frisk. Michael was in the pizza restaurant when the installation took place. He was not detained or questioned; he suffered no indignity;[15] nothing from the interior of the van was seized or searched; indeed, nothing even from the van's exterior was removed. *See Cardwell v. Lewis*, 417 U.S. at 591, 94 S.Ct. at 2470. The subsequent monitoring also did not violate Michael's reasonable expectation of privacy. The beeper only aided the agents in the performance of their lawful surveillance.[16] The van traveled public roads and was exposed to public view. Monitoring the beeper while the agents had reasonable suspicion to believe Michael was conspiring to manufacture MDA did not violate his fourth amendment rights.

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[15] *See Terry v. Ohio*, *supra*, 392 U.S. at 17-18, 88 S.Ct. at 1877.

[16] At oral argument, Michael's counsel called our attention to the recent Second Circuit case of *United States v. Taborda*, 635 F.2d 131 (2d Cir. 1980). *Taborda* held that binocular-enhanced viewing of the interior of a home may violate a defendant's reasonable expectation of privacy. Although there exists some authority for the opposite view, *United States v. Hufford*, 539 F.2d 32, 34 (9th Cir.), *cert. denied*, 429 U.S. 1002, 97 S.Ct. 533, 50 L.Ed.2d 614 (1976); *United States v. Grimes*, 426 F.2d 706, 708 (5th Cir. 1970), our holding today does not contradict *Taborda*. The police in *Taborda* were viewing into a private home, not observing the open movements of a motor vehicle on the public highways. *See United States v. Allen*, 633 F.2d 1282 (9th Cir. 1980).

C. Competing Interests

[7, 8] Third, we consider the governmental interest in eliminating illegal drug manufacture to be a persuasive reason to permit this minimally intrusive practice.[17] An "intermediate response" based on something less than probable cause,[18] is a proper investigatory tool to aid DEA agents in discovering and eliminating clandestine laboratory operations. In balancing the public concerns served by the use of the beeper, to discover Michael's drug manufacturing apparatus against the slight infringement of Michael's expectation of privacy, we find the beeper's use to be eminently reasonable. We hold that the installation and monitoring of the beeper involved no violation of Michael's fourth amendment rights. Accordingly, we reverse the district court's suppression of the evidence seized at the warehouse.

REVERSED.

JOHN R. BROWN, Circuit Judge, concurring:

Although I would hold categorically this was not a search or seizure I concur fully in Judge Ainsworth's opinion and all but the last sentence of the first paragraph of Judge Charles Clark's opinion.

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[17] The governmental interest in deterring criminal conduct may properly be balanced against an individual's privacy interests in fourth amendment cases. *See, e. g., Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 1885, 60 L.Ed.2d 447 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 2579, 45 L.Ed.2d 607 (1975). In *United States v. Himmelwright*, this court stated:

> "[R]easonableness" in the fourth amendment sense always depends upon a balance which must be struck between, on the one hand, the level of official intrusion into an individual privacy and, on the other hand, the public interest to be served by such an intrusion.

551 F.2d 991, 994 (5th Cir. 1977).

[18] *Adams v. Williams, supra*, 407 U.S. at 145, 92 S.Ct. at 1921, 1923 (1972).

CHARLES CLARK, Circuit Judge, with whom GEE, TJOFLAT, HILL,* HENDERSON* and REAVLEY,* Circuit Judges, joint, specially concurring:

I concur in Judge Ainsworth's reversal of the district court's exclusion of evidence. I also concur in his holding that no invasion of constitutionally protected privacy occurred when police with the degree of reasonable suspicion present here attached an electronic tracking device to Michael/Thompson/Johnson's van. This concurrence is special because, in my view, Judge Ainsworth's analysis is improperly cast in fourth amendment terms.

The beeper is no more than another device to aid police. Satellite cameras, computers, microscopes, and mass spectrometers are highly sophisticated but accepted tools police can now use to detect crime. Officers routeingly use radios, radar, helicopters, quick-access files of license tags and fingerprints, and interdistrict crime information exchanges in the performance of their duties. Binoculars, night vision equipment, even sunglasses and ordinary eyeglasses may serve to enhance a patrolman's ability to observe a suspect. Yet most of these devices and systems intrude into areas of citizens' lives that were private in the day of the deerstalker and magnifying glass. They are used and permitted to be used because society wants the policy function to be efficient. They are needed to keep police protection abreast of criminal cunning and affordable to taxpayers.

Requiring the fourth amendment's warrant procedure to be used or excused every time a policeman's senses or abilities are mechanically or electronically enhanced

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*Hill, Henderson and Reavley, Circuit Judges, also fully concur in the majority opinion.

would diminish their usefulness needlessly. The fourth amendment should be reserved for instances when its explicit protection "against unreasonable searches and seizures" is truly involved. Calling the attachment of a beeper to an automobile a search creates confusion at the outset—it is neither a search nor a seizure. As importantly, extending the illogic of the exclusionary rule (which punishes society for the transgressions of errant police) to non-search situations puts undue pressure on courts to infringe the core right at issue—the right to privacy. Where no search or seizure is involved, police abridgement of the right to privacy should be rectified as other similar constitutional infringements are—through a private action against the errant officer.

TATE, Circuit Judge, with whom KRAVITCH, FRANK M. JOHNSON, Jr., POLITZ, HATCHETT, RANDALL, THOMAS A. CLARK and JERRE S. WILLIAMS, Circuit Judges, join, dissenting:

Sitting en banc in mini-convention of twenty-four appellate judges, a majority of our court has decided that an individual living under our Constitution has no reasonable expectation of privacy such as would protect him from a trespass upon his property by governmental agents, a trespass that enables them to maintain continuous electronic surveillance over his movements twenty-four hours per day continuously and indefinitely. The same act, if committed by a private person, would subject that person to criminal and civil liability. The majority—contrary to every circuit that has considered the issue—has determined that executive agents of the government may, without legislative or judicial authorization, ignore an individual's proprietary or possessory interest in his own property under circumstances self-determined by the exe-

cutive agents as affording them reasonable suspicion that their trespass might lead them to information of law violation.

With deference to the majority, this holding that governmental agents may invade or use a private person's property by a trespass in violation of statute is truly subversive of our Constitution's protection of private property rights against intrusion or taking by executive agents except as authorized by valid legislation.[1] It is, of course (in my view), violative of the great principles incorporated in our Bill of Rights that every individual living under our Constitution is protected against arbitrary intrusion by government upon the privacy of his person or the sanctity of his property.

I.

As I read the majority opinion, it does not question that (as found by the trial court) no exigent circumstances required the immediate installation of the beeper, and it further concedes, albeit somewhat grudgingly, that the

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[1] It has been suggested that, rather than leave the installation of a beeper to untrammelled executive discretion, the sensitive values at issue may best be served by legislation expressly authorizing such an executive trespass under limited conditions, subject to prior judicial assessment of its necessity and subject to judicial supervision of its duration and extent, similar to the legislation enacted with regard to wiretapping. See, e. g., Note, *Tracking Katz: Beepers, Privacy, and the Fourth Amendment*, 86 Yale L.J. (1977). Even absent such legislation, as appeals in this court have indicated, some district courts, regarding the installation of a beeper as a "search", have judicially authorized the installation upon a showing of probable cause. *Id.* In the present record, the matter of securing a warrant from a magistrate was discussed by the law enforcement officers with the United States Attorney's office at a time sufficiently in advance of the actual installation as to have permitted the issuance of a warrant; there are, in my opinion, implications in the record that the warrant was not sought because of the absence of the judicially-required probable cause.

unauthorized attachment of the beeper to the exterior of the automobile is a "search" within the meaning of the Fourth Amendment,[2] a concession perhaps arising from the virtually unanimous jurisprudence to such effect[3]—and, indeed, the government does not dispute that placement of the beeper is considered a "search" for Fourth

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[2] The following observations are the writer's personal views and are not necessarily shared by any judge who concurs in this dissent:

Although there is a yet little jurisprudential support for the position, the writer would individually tend to agree with Judge Charles Clark in his special concurrence that we are actually presented with a Ninth Amendment protection of the individual's right to privacy of his person and protection of his property against unauthorized intrusion by the agents of government. See the panel, *United States v. Michael*, 622 F.2d at 148 (n.10). However, unlike the concurrence, the writer believes that the Ninth Amendment protection of an individual's privacy and private property constitutionally requires no less probable cause and magisterial oversight through a warrant than the Fourth Amendment "search"—without the rather tortuous necessity of articulating the Constitution's application in terms of an unreasonable "search", as the Court historically and consistently has done, see panel opinion, 622 F.2d at 746, 749.

In some quarters, it is fashionable at the moment to decry the exclusionary rule and its alleged illogic in letting the criminal go free because the constable blundered. However, the exclusionary rule is the law of the land as enunciated by that Court by which our Constitution is ultimately enforced. Further, I would venture to say that against all the defects arising from its application, its imposition by the Court has greatly improved compliance by executive agents with the mandates of the Constitution. *Mapp's* enunciation of the exclusionary penalty for violation of the constitution recognized that private action by a victim of an unconstitutional search provided no practical remedy at all. Before *Mapp*, there was no effective sanction to enforce compliance with the constitutional mandate of the Fourth Amendment, applicable by virtue of the Fourteenth to state officers as well as federal. Without the exclusionary rule, the courts become complicitors in unconstitutional actions of law enforcement officers that result in convictions, although perhaps tut-tutting like Pontius Pilate. For reasons such as these, a Ninth Amendment violation should likewise implicate an exclusionary rule.

[3] See original panel opinion, *United States v. Michael*, 622 F.2d 744 (5th Cir. 1980) at 746, 749.

Amendment purposes. The majority then states that because the private property searched was an autumobile and because the illegal trespass on its exterior was minimally intrusive, the defendant had such insufficient expectation of privacy that the governmental agents were not only relieved of the requirement to obtain a warrant under the judicial supervision before installing the beeper, but also that they could do so merely on reasonable suspicion that the vehicle's possessor was engaged in criminal activity. The fundamental basis for the majority's view is that objective private property rights are more or less irrelevant in determining whether governmental agents may search his property—the principal criteria by which this trespass is tested is, instead, whether the judges reviewing the action determine (based in the ultimate on the judge's subjective views) that the victim whose property was searched had himself both a subjective and objective expectation of privacy.

The Constitution itself, and particularly the Bill of Rights, was adopted at a time when fresh in men's minds was the experience of governmental theory that an individual's right to his property could be subordinated to the executive's need for it (quartering troops, for example). It repeatedly recognizes the sanctity of private property against unauthorized governmental use or trespass or taking. The Supreme Court of the United States, the interpreter of that constitution, has never, in the utilization of the "reasonable expectation of privacy" test,[4]

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[4] The "reasonable expectation of privacy" test was adopted by the United States Supreme Court in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1969), which involved electronic eavesdropping, to *broaden* the constitutional protection of individual liberty against governmental electronic search, which theretofore had depended upon whether a trespass had occurred. See panel

deviated from recognition of the fundamental Fourth Amendment protection of a proprietary or possessory interest in private property, be it a building or a vehicle, as will be shown. Nor do its opinions warrant disregard of the objective line where property rights begin, as marking the minimum area beyond which government cannot intrude without authorization or exigent circumstances, and the substitution instead of a standard to be evolved according to the notions of judges of a given time and place of the privacy to be accorded the possessor of private property.

In Part IV below I shall attempt to demonstrate that the authorities relied upon by the majority should not be construed to support its propositions: *A.* that a governmental trespass is of no moment, even though the defendant has a proprietary or possessory interest in the property searched, because a reasonable expectation of privacy is the sole measure by which to test whether the government's intrusion on private property is unreasonable; *B.* that an individual has no expectation of privacy in the exterior of his automobile, even insofar as a continuous trespass providing indefinite surveillance; *C.* that, because of the government's interest in law enforcement, reasonable suspicion alone—without a warrant or exigent circumstances—suffices to justify such a governmental invasion of private property. Before doing so, in Part II I shall point out the nature of the invasion and some of the implications of the majority's rationale that justifies the

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opinion, 622 F.2d at 748-51. The majority incorrectly relies upon the *Katz* test to *limit* the constitutional protection accorded a victim of a trespass, in presumed reliance upon *Rakas* and its progeny—inapplicable decisions that involved the nonexpectation of privacy in a person *without* any proprietary of possessory interest in the property searched, see Part IV *A* of this opinion, *infra*.

present warrantless invasion on reasonable suspicion alone, and in Part III I will briefly summarize how radically different is the majority's approach from that of every other circuit that has approached the issue before us.

II.

Without judicial authorization limiting its duration, the attachment of a beeper to an automobile permits electronic tracking of its movements twenty-four hours per day indefinitely. The automobile is tracked wherever it goes, whether within the confines of a private estate or on the public streets, whether visually observable from a public place or not. The trespass may be momentary in initial placement, but its consequences are continuous and indefinite. As the panel opinion stated, this intrusion by trespass is "generically different in degree and kind" from the type of warrantless intrusion heretofore justified, such as opening a car door to see an identification number, *United States v. Johnson*, 431 F.2d 441 (5th Cir. 1970) (en banc), or scraping paint from an automobile already previously impounded lawfully (i. e., seized in its entirety) by reason of probable cause and exigent circumstances, *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1970).

The majority relies upon *Cardwell*, which concerned a generically different type of trespass, to hold that the possessor had no reasonable expectation of privacy as to the *exterior* of his automobile. In doing so, the majority at least inferentially admits that the defendant's reasonable expectation of privacy would have been violated if the beeper had been placed, by a momentary trespass of opening the door, in the *interior*, say under the seat of the vehicle. The Constitution would *then* have been offended by the placement of the beeper in the vehicle's *in* terior,

although the consequences of continuous and indefinite surveillance are no more than if the trespass had instead concerned the vehicle's *ex* terior. The Constitution's protection does not depend on a fine line of the type of trespass that is so irrelevant to the individual's freedom from unauthorized governmental invasion; the illogic of an *in* terior-*ex* terior distinction through reliance upon *Cardwell* illustrates the inapplicability of *Cardwell* to determination of the issue before us, which concerns a generically different situation.

However, if faced by the installation of a beeper inside the vehicle, perhaps the majority might well say that, after all, in their view the individual had no reasonable expectation of privacy that was violated, the intrusion being so momentary. The majority's reasoning—once it has made the quantum leap it *has* made by holding *this* governmental trespass justified by reasonable suspicion alone—could well support such a result.

Indeed, the examples given of the degrees of privacy and intrusion that justify less than full Fourth Amendment protection—an intrusion into the human body versus a stop and frisk; the ransacking of a suspect's house versus an examination of an automobile to determine its vehicle identification number—are indicative that the majority may well be willing to remove Fourth Amendment protection against installation of beepers to far more than the exterior of automobiles. The majority's analysis and rationale, it seems to me, could equally support the momentary and unobtrusive attachment of a beeper to the suspect's coat, while it was on a coatrack as he sipped coffee (when, under the present facts, the agents were instead installing the beeper on his van parked outside the coffeeshop). Again, the analysis and rationale

could easily support the unobtrusive implacement of a beeper in a suspect's shirts and suits when at the laundry or cleaner (or even on a clothes line outside his home).

It is possible (but I doubt it) that the majority intends to permit such governmental surveillance activities by its test limiting the government's unauthorized use of private property to maintain continuous electronic surveillance *only* by the degree of intrusiveness and what the deciding judges deem to be the suspect's reasonable expectation of privacy. (These examples, after all, are minimal intrusions, and the government could visually follow him in person as well as his vehicle; and, similarly, the beeper only tells the suspect's location, so therefore what right of privacy does the individual have that is violated?) These illustrations of the type of trespass-based continuous surveillance opened up to government by the majority's rationale illustrate, I hope, not the majority's intentions but, instead, a fundamental defect in its analysis: the assumption that the initial momentary trespass on the exterior of an automobile can somehow be separated from the continuous and indefinite electronic surveillance made possible by it, in determining whether an individual's reasonable expectation of privacy has been invaded by actions of executive agents not legislatively or judicially authorized.

III.

The majority's opinion concludes that reasonable suspicion entitles governmental agents to install a beeper upon a private automobile, and that irrelevant to lawfulness of the implacement are probable cause, the necessity of a warrant, and exigent circumstances. The majority concludes that executive agents may do so without legislative or judicial authorization, and in doing so its opinion

persuasively cites excerpts and principles from prior jurisprudential interpretations that effectively cloak the majority's radical departure from previously accepted Fourth Amendment principles. I will attempt in Part IV *infra* to demonstrate how each of the majority's postulates are based upon jurisprudential expressions arising in issues fundamentally different from that now before us.

The majority's resolution of the sensitive and complex issue before us totally differs from that of any circuit that has approached it. The original panel opinion in some detail summarizes the views and holdings of other circuits. 622 F.2d 747-48. The en banc majority refers only glancingly to these decisions, ignoring the very real Fourth Amendment concerns expressed by them. The majority likewise ignores the rationales and holdings of these decisions by other circuits, which without exception totally conflict with the rationale used by the majority in its present repeal of Fourth Amendment application to the installation of beepers to private automobiles.

I will not here reiterate the panel opinion's more detailed analysis of the decisions of the other circuits. Generally, they do not regard electronic surveillance itself of the vehicle or aircraft on the public road or airspace as invading any reasonable expectation of privacy (although some draw the line in favor of the individual's privacy insofar as evidence located through electronic surveillance continuing inside private premises).

With regard to the *initial placement* of the beeper on a vehicle or other private property, however, only one circuit (the First) has held that no warrant is required for installation upon a *vehicle;* but nevertheless that circuit requires the existence of probable cause as a prerequisite for instllation of the beeper. *United States v. Moore,* 562

F.2d 106 (1st Cir. 1977) (holding additionally, however, that a warrant with probable cause is required to insert a beeper in a *container* to be carried into a home).

No circuit has held that reasonable suspicion alone may justify the installation of a beeper on private property without the consent of a person with proprietary or possessory interest therein. *All* circuits other than the First that have touched upon the issue (the Sixth, the Eighth, the Ninth, and the Tenth) have either expressly held that a warrant is required for attachment of a beeper, *United States v. Bailey*, 628 F.2d 938 (6th Cir. 1980),[5] or have so considered (sometimes reserving the issue), in circumstances arising when evidence obtained through electronic surveillance has been admitted either because judicial authorization for the installation had first been secured before placement of the beeper, *United States v. Chavez*, 603 F.2d 143 (10th Cir. 1979), *United States v. Pretzinger*, 542 F.2d 517 (9th Cir. 1976); or else because either both probable cause and exigent circumstances

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[5] In *Bailey*, the initial attachment was made while the drum was in the government's possession. Nevertheless, the Sixth Circuit held that the continued electronic surveillance after the drum passed into the defendant's possession required a warrant founded on probable cause. The evidence thereby discovered was suppressed, even though a warrant had been secured, because it did not place a time limit on the surveillance.

In this circuit, the initial placement being lawful, the decisions would generally support a proposition that no further warrant was needed. See panel opinion, 622 F.2d at 746-47. But cf. *United States v. Lewis*, 621 F.2d 1382, 1388 (5th Cir. 1980) (where a warrant was obtained to authorize monitoring after initial placement of the beeper prior to the defendant's possession of the goods): "The installation of a beeper in goods physically possessed by the defendants might invade a Fourth Amendment privacy test, even if the beeper were never activated. There arguably is a right to enjoy the use of goods without the possibility of uninvited monitoring that an unactivated beeper would create."

justified placement of the beeper or else the initial placement on the property was made with the consent of a person with a proprietary or possessory interest in the property at the time of the placement (findings unnecessary to make, if indeed no warrant is required).

See: Eighth Circuit: United States v. Bruneau, 594 F.2d 1190 (1979) (consent); *United States v. Frazier*, 538 F.2d 1322 (1976) (probable cause plus exigent circumstances); *Ninth Circuit: United States v. Bernard*, 625 F.2d 854 (1980) (consent); *United States v. Dubrofsky*, 581 F.2d 208 (1978) (consent); *United States v. Miroyan*, 577 F.2d 489 (1978) (consent); *United States v. Curtis*, 562 F.2d 1153 (1977) (consent); *United States v. Hufford*, 539 F.2d 32 (1976); *Tenth Circuit: United States v. Clayborne*, 584 F.2d 346 (1978) (consent); *United States v. Shovea*, 580 F.2d 1382 (1978) (probable cause plus exigent circumstances).

The majority resolves the issue before us as concerning only a relatively easy weighing of the intrusiveness and nature of the unauthorized governmental invasion of private property, against the competing interest of government in law enforcement. Its bland resolution of that issue [6] differs from that of all other circuits and displays none of the privacy concerns expressed by their decisions (and indeed the other decisions of this circuit) that have approached the complex and sensitive Fourth Amendment problems raised by continuous and indefinite electronic surveillance of individuals through beepers placed on private property, with authorization or not, "because the beeper represents another step in the ad-

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[6] H. L. Mencken is alleged to have once said, "For every complex problem, there is usually a simple answer—and usually it's wrong."

vance toward an Orwellian future," *Bailey, supra*, 628 F.2d at 947 (concurring opinion, Keith, J.). Surely, the majority opinion's indifference to the privacy concerns expressed by almost every other decision that has touched on the issue, as well as the scholarly discussions of the issue (cited in the panel opinion but not referred to by majority), reflects an insensitivity to Fourth Amendment values and principles as previously understood.

IV.

The majority has extracted quotations and principles from decisions involving totally different concerns to reach its novel conclusion that indefinite and continuous executive trepass on private property is permissible upon the executive agents' reasonable suspicion alone, despite the absence of valid legislative or judicial authorization for such trespass. Upon analysis, the jurisprudential support for this conclusion approaches *nil*.

A. The "Reasonable Expectation of Privacy" Test: Trespass irrelevant where the defendant has a possessory or proprietary interest in the property?

The majority holds that, for Fourth Amendment purposes, it is irrelevant that the search by the governmental agents was accomplished by a trespass upon private property in which he had possessory interest, even though by reason of the subsequent continuing trespass the government maintained a continuous electronic surveillance thereafterwards on his movements, a surveillance that could have been maintained for an extended duration. The central error in the majority's premise is its ignoring as irrelevant the fundamental liberty of owning private property free of unauthorized governmental intrusion, a fundamental right especially enunciated in the Bill of Rights. Adopting the "reasonable expectation of

privacy" test, the owner of a proprietary or possessory interest in private property is constitutionally entitled to expect that executive agents of government will not trespass upon his property without authorization and will not, by continuing to trespass, use his property to maintain electronic surveillance upon his movements.

The heart of the majority's holding are the following statements from its opinion:

> The fourth amendment, in pertinent part, protects people's "persons, houses, papers, and effects, against unreasonable searches and seizures." Although originally viewed as protecting property rights of individuals, the Supreme Court has now rejected the idea that fourth amendment coverage turns on "arcane distinctions developed in property . . . law." *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430 [58 L.Ed.2d 387] (1978). Instead, the fourth amendment protects individuals from violations of their legitimate or reasonable expectations of privacy. *See id.; Katz v. United States*, 389 U.S. 47, 361, 88 S.Ct. 507, 516 [19 L.Ed.2d 576] (1967) (Harlan, J., concurring); *Jones v. United States*, 357 U.S. 493, 498, 78 S.Ct. 1253, 1256 [2 L.Ed.2d 1514] (1958). Expectation of privacy analysis is especially appropriate in cases like the instant one which involve an individual's rights with respect to an automobile. In *Cardwell v. Lewis*, 417 U.S. 583, 591, 94 S.Ct. 2464, 2470 [41 L.Ed.2d 325] (1974) (plurality opinion), Justice Blackmun stated, "[I]nsofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry."

___ F.2d at ___, sl. op. at 6924-6925.

The authorities cited arise in greatly distinguishable circumstances and do not support the majority's conclusion that the owner of private property may not reasonably expect that governmental agents will not without authorization intrude upon his property. Before

so demonstrating, however, I observe the following: *A*. The "pertinent" Fourth Amendment provisions are not only the excerpt cited by the majority but also the concluding clause that (as interpreted) requires that, other than in clearly delineated exceptional circumstances not here presented, no search or seizure shall be made except by warrant issued upon probable cause;[7] *B*. We are not here concerned as in *Rakas* with any "arcane distinctions developed in property and tort law between guests, licenses, invitees, and the like," 439 U.S. at 143, 99 S.Ct. at 430 (fleshing out the context of the catch-phrase quoted by the majority), but instead with a fundamental attribute of individual liberty guaranteed by our Constitution, i. e., the ownership of private property free of unauthorized governmental intrusion.

The authorities cited do not support the conclusion of the majority that a person with a proprietary or possessory interest in a motor vehicle cannot complain of a search founded on a trespass of governmental agents, when the deciding judges may determine that he had no reasonable expectation of privacy because of the nature of his property (an automobile) and that the intrusion was minimal in degree (attaching a beeper to the exterior).

[7] The Fourth Amendment provides in full:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

A central technical error in the majority's opinion is that, having conceded that a search of the defendant's own property occurred, it does not ever refer to the controlling constitutional interpretations that "the most basic constitutional rule in this area is that 'searches conducted outside the judicial process without prior approval by judge or magistrate, are *per se* unreasonable under Fourth Amendment—subject only to a few specifically established and well-delineated exceptions'." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971).

Katz, as previously noted (see note 4 *supra*), disregarded ancient niceties of tort or property law to hold that, *despite* the absence of a trespass (the previous determinant of a Fourth Amendment violation), a person in a telephone booth had a reasonable expectation of privacy against electronic eavesdropping. It was not intended to and it did not alter the basic Fourth Amendment protection against trespassatory searches of private property by governmental agents, a basic concept not intended to be altered by *Rakas* (see below) insofar at least as trespassatory searches complained of by a defendant with a possessory or proprietary interest in the property searched. See also original panel opinion, 622 F.2d at 749-51.

Jones held that probable cause is not sufficient reason to search a residence; a warrant also must be secured. I can find nothing in its language or holding that supports the majority's conclusion. Rather, if anything, it supports the dissenting view.

Rakas, of course, is the primary authority for the majority's view. *Rakas* does enunciate the "legitimate expectation of privacy" test as the primary criterion by which to determine Fourth Amendment violations. The issue before the court was whether a mere passenger in an automobile could complain of evidence seized by an unlawful search of the automobile. The core holding was that the defendant passengers had no legitimate expectation in the search of the automobile *because* they had no possessory or proprietary interest in the property searched: "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a *third* person's premises has not had any of his Fourth Amendment rights infringed." 439 U.S. at 133, 99 S.Ct. at 425 (italics supplied).

The Court thus held that a person *without* a possessory or proprietary interest in property may have no legitimate expectation of privacy that is offended by a search in violation of the Fourth Amendment. In so doing, the Court rejected the test suggested in *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697, that any person "legitimately on the premises" was aggrieved by an unlawful search. It is important to note, however, that in rejecting the *Jones* test as overbroad, *Rakas* expressly and repeatedly explained with approval the result in the decision—the evidence against Jones was suppressed, it having been seized in his friend's apartment, to which he had a key and for use of which he had permission—as based on Jone's legitimate expectation of privacy in the premises searched arising from his possessory interest therein. 439 U.S. at 140, 142, 148, 88 S.Ct. at 429, 430, 433.

Rakas may be authority for the proposition that one *without* a possessory or proprietary interest in property search has no reasonable expectation of privacy that is offended. It is simply not authority for the non-sequitur that one *with* such property interest likewise had no reasonable expectation of privacy. And, indeed, *Rakas* went to pains to state the contrary quite plainly:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blackstone, Commentaries, Book II, Ch. I, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.[8]

439 U.S. at 144, 99 S.Ct. at 431 (n.12).

[8] The Court continues, *Id.*

Expectations of privacy protected by the Fourth Amendment, of

Finally, the majority cites *Cardwell v. Lewis*. The decision is not authority for the proposition that violation of a non-ownership privacy interest alone raises Fourth Amendment implications with regard to the search of a motor vehicle. The ultimate issue there involved whether the police were required to secure an additional warrant to take paint scrapings from an automobile previously lawfully seized and searched for probable cause under exigent circumstances, when they had been entitled for these same reasons to search the car itself on the public street. The plurality opinion of the Court (there were four dissenters and one concurrence that did not reach the merits) held that, under those circumstances, the taking of the paint scraping founded upon probable cause did not violate any Fourth Amendment privacy interest. The decision is certainly not authority for the proposition that executive agents may, without warrant or probable cause—exigent circumstances, commit a trespass upon an motor vehicle for the purpose of securing evidence. See IV *B infra* for more extensive discussion of *Cardwell*.

In summary, the authorities relied upon by the majority, either singularly or in combination, do not support

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course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest. These ideas were rejected both in *Jones, supra*, and *Katz, supra*. But by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment. No better demonstration of this proposition exists than the decision in *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969), where the Court held that an individual's property interest in his own home was so great as to allow him to object to electronic surveillance of conversations emanating from his home, even though he himself was not a party to the conversations.

its conclusion that one with an ownership right in a motor vehicle does not have any legitimate expectation of privacy that is offended by a warrantless investigatory trespass upon its exterior by executive agents.

B. Does an individual have any reasonable expectation of privacy that is offended within the meaning of the Fourth Amendment when a trespassatory search is made of his vehicle's exterior in order to afford continuous surveillance of indefinite duration of his movements thereafterwards?

The majority concludes that the momentary trespass committed by the installation of a beeper on the exterior of a person's automobile, for purposes of following his movements thereafterwards, does not offend any reasonable expectation of privacy recognized by our society. In Part II of this dissent, I have noted what I view to be an erroneous analysis in considering the momentary trespass as the only privacy invasion rather than also the subsequent continuous electronic surveillance of unrestricted duration, judicially unauthorized and not judicially supervised. In Part IV *A* I have noted what I view to be the majority's error in disregarding as irrelevant for Fourth Amendment purposes the trespassatory invasion by executive agents of property in which a defendant has possessory or proprietary interests—the violation of a right to privacy against the government with regard to property privately owned that is not only reasonable but is also guaranteed by our Constitution. My purpose in *B* below is to note briefly the inapplicability of the authorities from which the majority's novel Fourth Amendment view is derived.

The majority seems to principally rely upon expressions in *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53

L.Ed.2d 538 (1977), on the language and holding of *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974), and in the holding of this court in *United States v. Johnson*, 431 F.2d 441 (5th Cir. 1970) (en banc). Of these decisions, in my opinion, only the latter is relevant to the issue before us—and its narrow holding that the Fourth Amendment is not violated by the opening of a car door by a police officer to verify the identification of a vehicle that he had reasonable cause to believe was stolen does not afford much guidance to our present decision. Here a much more egregious and continuous trespass was committed by the executive agents,[9] and here they had at most reasonable suspicion to believe that the person on whose property they trespassed was engaged in criminal activity.

Cardwell, on casual reading, likewise seems relevant. Even if so, it would not be persuasive authority because of the great dissimilarity of the issues. For reasons to be noted, I doubt its relevancy to the present issue.

As read by the majority, *Cardwell* holds that a momentary scraping of paint from the exterior of an automobile parked on the public street does not offend any reasonable expectation of privacy; any passerby could do the same, so to speak. By itself, the different nature of the intrusions (see II *supra*) would indicate that the present continuing trespass is not governed by *Cardwell*. However, more to the point, the technical trespass in *Cardwell* occurred upon a vehicle already lawfully impounded by the police for probable cause with exigent circumstances,

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[9] Actually, in *Johnson*, the police officer had permission from the defendant's wife to examine the vehicle more closely and to look at the serial plate on the vehicle. See *Johnson* panel opinion, 413 F.2d 1396, 1399 (1969).

a vehicle that for these same reasons the police could have searched prior to its removal to the impoundment lot. The decision may easily be read to hold that, where there was probable cause and exigent circumstances to search the vehicle at the time it was lawfully seized in its *entirety*, then the removal of the paint *with probable cause* (specifically required by *Cardwell*) *after* impoundment did not offend the defendant's Fourth Amendment rights.[10] In any event, *Cardwell's* holding cannot be said to support the scraping of paint, let alone the placement by trespass of a beeper, upon a vehicle in the public street upon reasonable suspicion alone and without a warrant or probable cause and exigent circumstances.

The excerpts from *Chadwick* quoted by the majority merely repeat the truism concerning the diminished expectation of privacy in motor vehicles, and in the *Chadwick* text the decisions cited to support the statements concern warrantless searches of motor vehicles upon *probable cause*, and they arise in situations foreign to the issue before us. The actual holding in *Chadwick affirmed* the suppression of evidence seized as the result of a warrantless search of a footlocker, although the footlocker itself had been lawfully seized and although the agents had probable cause to believe that the footlocker contained marijuana. *Chadwick* does not really provide any basis for

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[10] The vehicle had already been lawfully impounded by the police for probable cause and in exigent circumstances. The issue was whether the police should additionally have secured a warrant before taking paint scrapings from the exterior. The car had been removed from the public street, where any passerby could likewise have momentarily touched the vehicle to remove the scrapings. The court held: "Under circumstances such as these, *where probable cause exists*, a warrantless examination of the exterior of the car is not unreasonable under the Fourth and Fourteenth Amendments." 417 U.S. at 591, 94 S.Ct. at 2471 (italics supplied). [Footnote continued next page.]

the en banc holding; to the contrary.

Additionally, however, *Chadwick* contains a most eloquent statement of the historic purposes of the Fourth Amendment to impose judicial control over executive searches of private property. 433 U.S. at 6-11, 97 S.Ct. at 2481-83. These observations are of especial relevance to the issue presently before the en banc court, where executive agents without legislative or judicial authorization trespass upon private property and maintain by this continuing trespass an electronic surveillance of a nature and duration subject to no judicial supervision.

C. Reasonable suspicion alone, without a warrant or exigent circumstances, justifies executive agents in the investigatory trespass committed by installing a beeper on an automobile for purposes of continuous surveillance?

Without (as will be seen) any jurisprudential foundation, the majority concludes that reasonable suspicion alone may justify executive agents in installing a beeper upon an automobile in which the defendant has a possessory interest, for purposes of continuous surveillance (of indefinite duration). The majority reaches this startling conclusion by balancing the individual's allegedly minimal complaint about the invasion of privacy in his automobile against the governmental interest in eliminating illegal drug manufacture. Again, the authorities cited do not support the conclusion.

As a necessary antecedent to this ruling, the court also found that the vehicle had been lawfully impounded upon probable cause and in exigent circumstances, 417 U.S. at 592-95, 94 S.Ct. at 2470-72. I read its ruling as being to the effect that, since the police had probable cause and exigent circumstances to seize and search the car at the time they impounded it from the public street, they could also make a warrantless examination of its exterior after they had impounded it. See *Chambers v. Monroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419, cited by the majority as the basis for this holding.

In the first place, the balancing argument adopted would enable the government to dispense with the Fourth Amendment warrant and probable cause requirements in almost all cases involving serious criminal activity. In requiring that probable cause (although no warrant) was required for installation of a beeper, the First Circuit in *United States v. Moore, supra,* rejected a similar balancing contention for convincing reason, 562 F.2d at 111 (citations omitted):

> Conduct which violates the fourth amendment is not made legal merely because it helps ferret out crime. If that were so, any invasion of privacy would be acceptable if it helped the police. It is true that the reasonableness of a search and seizure is sometimes said to involve balancing the Government's interest in the intrusion against the individual's interest in privacy. But under the Government's formulation, we are not asked to balance the competing interests but simply to ignore the individual's interest altogether.

In reaching the conclusion that reasonable suspicion alone of executive agents may entitle them to install a beeper on an automobile, the majority does not refer to the warrant requirement of the Fourth Amendment nor the basic constitutional rule that a warrantless search (which the majority admits this was) is *per se* unreasonable and must be justified as falling within the few recognized well-delineated exceptions. See note 7, *supra.* Instead, it contents itself with a cryptic reference to *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (the determination of Fourth Amendment rights of inmates of a prison), *United States v. Brignoni-Ponce,* 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) (quashing as unconstitutionally obtained evidence obtained from a stop near the border of a vehicle containing Mexican-appearing passengers, but indicating that reason-

able suspicion for articulated reason would suffice for a momentary stop to inquire as to the identification of the persons), and *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) (officer informed that suspect is armed may conduct a limited search for arms if he has reason to believe that the suspect is armed and dangerous).[11] The decisions cited, for the reasons indicated by the parenthetical summary of their holdings, simply cannot be regarded as authority that the Fourth Amendment warrant-probable cause requirements may be dispensed with for installation of a beeper in what is in essence a routine and traditional type of criminal investigation.

Conclusion

The Fourth Amendment requires that no individual's person or property shall be searched except upon warrant founded upon probable cause, a constitutional command rigorously enforced absent exigent circumstances, save in traditionally recognized exceptions or circumstances (e. g., border searches) into which this routine criminal investigation does not fall. The majority concedes that there were no exigent circumstances and that for Fourth Amendment purposes the present implantation of the beeper is a search. It nevertheless requires neither warrant nor probable cause, only reasonable suspicion by the executive agents for the search by these agents. The latter, without legislative or judicial authorization, committed their search by a trespass upon property in which the

[11] The majority also relies for the reasonable suspicion standard upon decisions that concern customs searches at the border expressly authorized by statute and traditionally not subject to the Fourth Amendment's warrant-probable cause requirements. *United States v. Afanador*, 567 F.2d 1325 (5th Cir. 1978); *United States v. Smith*, 557 F.2d 1206 (5th Cir. 1977); *United States v. Himmelwright*, 551 F.2d 991 (5th Cir. 1977). I see no reason to discuss the obvious inapplicability of these decisions.

defendant had a possessory interest, and in violation of state trespass statutes.[12] I find no support in the jurisprudential interpretations for the majority's conclusion that the defendant had no reasonable expectation of privacy in his vehicle and that the Fourth Amendment was not violated by the trespass of these agents of the executive, which enabled them to maintain continuous electronic surveillance of his movements of indefinite duration, completely without statutory or judicial authorization and subject to no judicial supervision as to the reasonableness of its extent or duration.

I therefore, respectfully dissent.

[12] The electronic surveillance took place in Georgia in violation of that state's civil and criminal statutes. Aside from providing a private damage action for violation of the "absolute right" of enjoyment of real and personal private property, Code of Georgia § 105-1401, see §§ 105-1406, 105-1703, Georgia provides severe criminal penalties (not less than one nor more than five years penitentiary imprisonment) for invasions of privacy through unauthorized electronic and other surveillance. Code of Georgia, §§ 26-3001 through 3010. Among other activities made criminal, the act prohibits any person from going "on or about the private premises of another or any private place for the purpose of invading the privacy of another by . . . secretly observing their activities," § 3001(c), or from using "any instrument or apparatus, without the consent of all persons observed, to . . . record the activities of another which occur in any private place and out of the public view," § 3001(b), or from committing "any other acts of a nature similar to those set out . . . which invade the privacy of another," § 3001(f). Law enforcement officers are permitted to undertake electronic surveillance only upon probable cause and after written application approved by a judge of the state circuit court, provided the warrant specifies with particularity the devices to be used, and the purpose, duration and circumstances of use permitted, as well as other specifics. § 3004. Evidence of this nature is admissible in state court only if obtained in conformity with the statute § 3004(g).

I am unaware of any principle that justifies federal judges to hold that without federal statutory or other authorization federal executive officers may upon their reasonable suspicion alone violate state criminal statutes in order to obtain evidence for use in a federal prosecution.

GODBOLD, Chief Justice, with whom KRAVITCH, FRANK M. JOHNSON, Jr., POLITZ, HATCHETT, RANDALL, TATE, THOMAS A. CLARK and JERRE S. WILLIAMS, Circuit Judges, join, dissenting:

I adhere to the established jurisprudence requiring that a search be made with a warrant issued upon proper showing to a magistrate unless there is probable cause plus exigent circumstances.[1]

The majority cut new ground by an analysis that runs this way. They accept that the appropriate inquiry is whether Michael's legitimate or reasonable expectations of privacy were violated. Pursuing this inquiry they first concluded that Michael's expectation of privacy was diminished because a vehicle was involved and because it was parked in a public place. Next they examine the degree of intrusion and describe it as minimal. Having reached these preliminary conclusions as a predicate, the majority find that the agents had reasonable suspicion that Michael was engaged in criminal activity and that this justified placement (and monitoring) of the beeper without the necessity for a warrant. The subsequent monitoring is then further justified as not invading Michael's privacy interest because it only assisted the agents in their performance of lawful surveillance and because the van traveled public roads and was exposed to public view.

In the final step, the majority balance the governmental and public interest in eliminating illegal drug manufacturing against the "minimal" intrusion and find that the warrantless installation and subsequent use of the beeper were "reasonable."

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[1] None of the other exceptions to the warrant requirement, such as search incident to arrest, is even arguably involved.

I agree that the Supreme Court has made clear that protection of a legitimate or reasonable expectation of privacy is the proper inquiry.[2]

Was Michael's privacy interest limited and the intrusion nominal? It is simply not an answer to these questions to say "all that is involved is an automobile and everybody knows that automobiles are used publicly," and "all the officers did was to aid in finding out what they could have observed visually anyhow." Usually, in defining the contours of legitimate or reasonable expectation of privacy one must necessarily consider both the nature of whatever corporeal item is involved and the kind of governmental action that is claimed to have improperly invaded the privacy interest that the victim has in the item. It is obvious that an automobile moves freely in public and parks in public places and, because it is open to view, the owner has no reasonable or legitimate expectation that the exterior of the vehicle will not be seen through visual observation. Furthermore, the owner has no reasonable expectation of privacy in the numbers on his license plate and the identification numbers fixed to the door post or stamped on the frame or on the engine block. A court might well sustain an officer's running his finger down the side of a publicly parked car to collect a dust sample. The courts have even sustained taking a paint sample from the exterior surface of a car previously seized and impounded.[3] But the nature and use of the tangible item are not the end of the inquiry. One must also ask "privacy against what kind of governmental action?" Or, in the Supreme Court's phrase, what is the "scope of the intrusion"? *Bell*

[2] My approach is different from that of Judge Tate—if different at all—only in degree. His convincing dissent emphasizes the invasion of property interests while I prefer to emphasize governmental invasion of the individual's expectation of privacy.

[3] *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1970).

v. Wolfish, 441 U.S. 520, 559, 99 S.Ct. 1861, 1885, 60 L.Ed.2d 447, 481 (1979). It is only when this question is asked that we conclude that the public use of a vehicle and its exposure to public view do not justify searching interior portions of the vehicle not in plain view without either a warrant or probable cause plus exigent circumstances. The same applies to a suitcase. It is movable, generally used in full public view, freely handled and touched by common carrier personnel while the owner is traveling by public transportation. There is no privacy interest protecting against observation of its exterior. But no one any longer seriously argues that the suitcase's qualities of mobility and public exposure permit police to open it without a warrant or exigent circumstances plus probable cause.

It is both inaccurate and disingenuous to treat the governmental intrusion in this case as limited to the mere transitory and *de minimis* trespass committed by attaching a small object to the van. The significant intrusion arises from the capacity of the small device to emit a signal that identifies to police the location of the vehicle. The officers, by attaching the electronic device, made the van into a mechanism for reporting to the government its own location and necessarily the location of persons occupying it. The government, without Michael's consent or knowledge, made him into a broadcaster of the details of his own affairs. The listener is the government. The signals are simple. But they are damning. This is far from minimal. It strikes at the heart of the protection that the Fourth Amendment affords to the person and his affairs and effects in the relationship between him and his sovereign. This significant intrusion into Michael's affairs cannot be justified on the ground that the electronic device

was attached to his automobile and the privacy interest in an automobile is not strong.[4]

Actually, the government's action comes close to impinging on interests protected by the Fifth Amendment. The government, by a trespass minimal in the physical sense, causes the unwitting suspect to become a reporter to the government of information incriminating to himself.[5] We view with loathing totalitarian systems that require a person traveling from one place to another to check in with the police and report on his movements. The majority treat as trivial the privacy interest against one's unwittingly but continuously making the same kind of report through an electronic device attached to the property by which he moves from place to place. I do not consider this trivial.

Significantly, while eschewing common law property concepts as irrelevant, the majority employ these same concepts to conclude that the officers' actions here were merely a minimal, technical and transitory trespass. In a property sense the majority are correct. But these property-rooted justifications tell only a fraction of the story.

The majority refer, n. 14, to the pen register case [6] in which installation and use of a register at the telephone company's central office to record numbers dialed by the

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[4] Surely the govern ment cannot attach a camera to one's bedroom window and photograph those inside and justify it on the ground that windows are visible to all and m ade to see through and thus enjoy no privacy. The Fourth Amendment pr otects people not chattels.

[5] This is different from dye on the bank's bait money. The bank robber has no privacy interest in the loot.

[6] *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).

defendant did not violate the Fourth Amendment because the telephone user always conveys to the telephone company numerical information that can be permanently recorded at the will of the company, and the user has no reasonable expectation that the telephone company will not disclose this recorded information to police. If Michael were a user of a commercial shortwave radio system by which he could talk from his van to his office, and his transmissions could be taped by the owner of the system in order to compute user charges on a time basis, Michael might not be able to complain if the police put a bug at the owner's headquarters to pick up what Michael said over the air. But Michael is not a subscriber to a commercial service, the use of which may involve giving up his privacy interests. He is not even knowingly sending signals of any kind to anyone.

Surveillance of the car through monitoring the attached beeper cannot properly be justified on the ground that this merely aids officers who could visually surveil the vehicle. Freedom to visually observe does not of itself justify other means that might reveal the same information. If for no other reason, the beeper's scope is wider than the surveilling eye can visually observe. It does not shut off if the van enters private property and leaves public view so that it may no longer be seen. It does not turn off when the owner parks the van in his garage and locks the garage door to protect against entry by others, including police officers. If an officer broke into a car and secreted himself in the back seat in order to find the car's route and destination, we would summarily reject an argument that his act was constitutionally justified because another officer might have obtained the same information by following the car. Moreover, this "alternative availability" ration-

ale (a sort of first cousin to the discredited "inevitable discovery" rule) ignores the interest that one has against being made into a self-incriminating broadcaster of his own affairs.

The standard that reasonable suspicion of criminal activity is a justification for a warrantless search is newly created in this case. No case is cited to support it.[7] In oral argument government counsel were asked to supply cases supporting this theory. Counsel could come up with nothing. Sitting in en banc we have the power to create this new rule subject to Supreme Court review. But there should be some better basis than the mischaracterization of the intrusion as a nickel and dime trespass, and the fact that the police were trying to catch illegal drug manufacturers. As surely as the sun rises, reasonable suspicion will now be urged as justification for intrusions that even the majority would accept as serious, and searches heretofore barred by the Fourth Amendment will be urged as valid because done in pursuit of all types of suspected criminal activity. In fact, few searches are made for any reason other than attempts to catch suspected law violators.

In their final point the majority hold that the governmental interest in eliminating illegal drug manufacturing is to be balanced against Michael's expectation of privacy

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[7] In another part of the opinion the majority refer to *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) as justifying a "intermediate response" based on something less than probable cause. In *Adams* the officer reached through the window of a car and removed a loaded pistol from the defendant's waistband. This action was held valid as "a limited intrusion designed to insure [the officer's] safety," under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Probable cause then existed to arrest Williams for unlawful possession of the weapon. The present case is unrelated to the limited protective actions authorized under *Terry*.

to determine if the Fourth Amendment has been violated. Justifying a search on the basis that it is handy for the police is a new theory. In this country the balancing is done in the magistrate's office through a request for a warrant based upon probable cause, or under circumstances so exigent and knowledge sufficiently strong that we dispense with the requirement of a warrant. *Bell v. Wolfish, supra,* held that visual body cavity searches in a prison could be conducted on inmates who had just had contact visits with persons from outside the prison, without the necessity of probable cause. Prison officials testified that the searches were necessary not only to discover but also to deter the smuggling of weapons, drugs and other contraband into the institution. The court dealt with what is called "a unique place fraught with serious security dangers," in which smuggling of money, drugs, weapons and other contraband were common occurrences and inmate attempts to bring these items into the facility by concealing them in body cavities were documented in the record. No such unique facility or problem is involved in this case. The only interest in the government's end of the "balancing" to which the majority refer is that this is a drug case. No special need was shown for the information sent by the beeper. Indeed, one of the grounds on which the majority justify the governmental action is that the police could have obtained essentially the same information by visual surveillance.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellant,

v.

Barry Dean MICHAEL, a/k/a Mike Thompson,
a/k/a Mike Johnson,
Defendant-Appellee.

No. 79-2679.

United States Court of Appeals,
Fifth Circuit.

July 28, 1980.

The United States District Court for the Northern District of Georgia, Newell Edenfield, J., sustained defendant's motion to suppress certain evidence, and Government appealed. The Court of Appeals, Tate, Circuit Judge, held that whether the test is probable cause or reasonable suspicion, absent exigent circumstances, a warrant issued under judicial supervision is required before an electronic tracking device may be installed without consent on private property for purposes of electronic surveillance even though such private property is a motor vehicle parked at the time in a place open to the public, and the device is attached only to vehicle's exterior.

Affirmed.

Searches and Seizures 3.2

Whether the test is probable cause or reasonable suspicion, absent exigent circumstances, a warrant issued under judicial supervision is required before an electronic tracking device may be installed without consent on private property for purposes of electronic surveillance even though such private property is a motor vehicle

parked at the time in a place open to the public, and the device is attached only to vehicle's exterior. U.S.C.A. Const. Amend. 4.

Appeal from the United States District Court for the Northern District of Georgia.

Before KRAVITCH, HATCHETT and TATE, Circuit Judges.

TATE, Circuit Judge:

This panel faces an issue on which the en banc court divided equally: Whether, absent exigent circumstances, governmental agents may install an electronic tracking device (a "beeper") upon a private automobile without first securing judicial authorization? A panel of this court unanimously held in the negative. *U. S. v. Holmes*, 521 F.2d 859 (5th Cir. 1976). An application for en banc hearing was granted, 525 F.2d 1364 (5th Cir. 1976). On such rehearing, due only to the even division of the sixteen judges participating, the district court's judgment requiring a warrant was affirmed. 537 F.2d 227 (5th Cir. 1976).[1]

In the case before us, the defendant Michael was indicted on two counts (along with three co-defendants) for conspiracy to unlawfully manufacture methylenedioxyamphetamine (MDA), a Schedule II Controlled Substance, and for the unlawful distribution of MDA, in violation of 21 U.S.C., Sections 841(a)(1) and 846. The defendant Michael moved to suppress certain evidence as unconstitutionally seized. With regard to the issue before

[1] Since this panel independently adheres to the views expressed by the original panel decision in *Holmes*, we do not reach the issue of whether the vacation of the panel decision by the grant of en banc hearing vitiates its precedential effect. *But see United States v. Conroy*, 589 F.2d 1258, 1263 (5th Cir. 1979).

us, the evidence was seized from a warehouse (the search of which *was* authorized by a warrant), the location of which had been ascertained as a result of the warrantless installation of a beeper on a van rented and operated by Michael. The warehouse was located four days after installation of the beeper through following Michael's van with its aid. Relying on *Holmes*, the district court suppressed the evidence as the fruit of the warrantless installation of the beeper; it held that the Fourth Amendment was violated by the failure of the governmental agents to obtain judicial authorization (a search warrant) prior to installation of the beeper, and to the subsequent monitoring of the vehicle through its use. The government appeals. 18 U.S.C., Section 3731.[2] For reasons to be stated, we affirm.

I.

The central issue of this appeal is thus whether, absent exigent circumstances, a warrant issued with judicial approval is required before governmental agents may attach to a privately owned vehicle, without consent of one entitled to give it, a "beeper" or electronic tracking device. The panel agrees that, should judicial authorization be required, then the trial court's conclusion is not clearly erroneous that no exigent circumstances justified the immediate installation of the beeper without prior judicial approval.[3] The panel is of the further opinion that only

[2] The defendant cross-appealed from the denial of his motion to suppress certain *other* evidence seized in a search *independent of* the beeper issue. At oral argument, the defendant's counsel conceded that the denial of the motion was not an appealable final decision and that the cross-appeal should be be dismissed on jurisdictional grounds, as the government argued.

[3] The government argues that exigent circumstances existed: Until "Mike Thompson" appeared at the warehouse for this purchase of

reasonable suspicion [4] existed—at the time the beeper was installed—to believe that the defendant was connected

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chemicals, the agents had no leads as to his identity or as to what type vehicle he would be driving; and, despite the number of agents involved (six), it was impracticable to secure a warrant during the three hours or so of visual surveillance of the vehicle.

The defendant points out: The intention from August 8 until August 10 (see facts in footnote 4) had been to install a beeper on "Thompson" 's vehicle if an opportunity arose after the vehicle appeared at the chemical company—and, on "Thompson" 's slight connection until then with Welch (see footnote 4), a magistrate may well have refused this intrusion on Thompson's privacy until more connection by him with illegal conduct had been established. Even after the defendant appeared at the chemical company, there was full opportunity to establish "Thompson" 's identity and address by other than electronic surveillance. At that time, the identity and license number of the vehicle became known; through this information, prior to the installation of the beeper, the agents knew the van was a rental vehicle registered to the Wade Ford Company. Wade's records reflected that the rental was to the defendant at his correct address (although, admittedly, this information was not known to the agents at the time of the beeper's installation).

[4] The panel believes that the evidence shows that, at the time the beeper was installed, there could under the evidence be only reasonable suspicion that Michael was a member of the conspiracy to manufacture MDA (the illegal drug). Under the evidentiary showing, a "Mike Thompson" had in December, 1977 returned to a chemical warehouse a drum previously obtained by co-defendant Welch (for whom at the time probable cause did exist to believe he was engaged in the criminal activity). "Mike Thompson" also then left instructions for the warehouse to return Welch's $25.00 deposit to Welch. "Mike Thompson" had previously purchased chemicals from the supplier, not shown to be of suspicious character or amount. On August 8, 1978, "Thompson" purchased acetone, a substance used in the manufacture of MDA (although it also has many innocent uses), and he was to return to pick up his additional order of 20 gallons of acetone two days later. (At that time, i. e., August 10, the waiting government agents followed "Thompson" and, about three hours later, attached the beeper to his van at a public parking lot. No suspicious activity was observed during this three-hour interval.) A reasonable suspicion could arise that the purchase by Michael ("Thompson") of acetone (which has innocent uses as well) on August 8 and 10, 1978 may have been connected with Welch's probable-cause-established manufacture of MDA; but Michael's sole

with the criminal activity of another suspect (for whom probable cause did exist); but that, whether the test is probable cause or instead reasonable suspicion, a warrant issued under judicial supervision is required (absent exigent circumstances) before a beeper may be installed without consent on private property for purposes of electronic surveillance—albeit such private property is a motor vehicle parked at the time in a place open to the public, and that the beeper is attached only to its exterior.

Preliminarily, we note the factual circumstances attendant upon the use of a beeper for the purpose of maintaining electronic surveillance of the travel and location of the vehicle to which attached. The beeper is a battery-operated device that emits signals that can be picked up on a radio frequency. The signals show the approximate location and movement of the vehicle to which it is affixed. The beeper is quickly attached through its magnets to the underside exterior of the vehicle. Although a governmental witness testified that the battery usually lasts only ten days, the evidence in this case shows that the beeper installed on August 10th was still emitting signals at the end of August (when it was removed from the rental vehicle after its return to the automobile agency).

II.

In the instant case, the evidence was suppressed by the district court as the fruit of the warrantless installation of

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previous connection with Welch's operation was his return of Welch's drum to the warehouse in December, 1977, and his request that the $25.00 deposit be returned to Welch.

Subsequent to installation of the beeper, following leads thereby developed, the agents were able to establish probable cause to believe that "Mike Thompson" was the defendant Michael and that he was connected with other aspects of the conspiracy's operation.

a beeper. The narrow issue concerns the initial unauthorized installation of the beeper upon a vehicle, when no exigent circumstances justified doing so if prior judicial authorization is required.

In *Holmes*, the panel decision held that the warrantless attachment of a beeper to private property, under such circumstances, is a per se intrusion on Fourth Amendment rights. Distinguishing the attachment from such minimal and momentary intrusions as checking vehicle identification numbers or taking paint scrapings, the panel decision held that the beeper, remaining constantly in place, performs a search of much more substantial and therefore unreasonable duration and scope.[5] The panel decision essentially held that the installation of the beeper without consent upon private property is a "search" subject to Fourth Amendment warrant requirements, in the sense that it is an unreasonable governmental intrusion upon the individual's constitutionally guaranteed right of personal security, personal liberty, and private property. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886).

[5] The panel decision indicated that not only the initial placement of the beeper but also its attachment during the entire period of its use implicates Fourth Amendment interests of the privacy rights of persons with standing to complain. This portion of the holding arguably has been eroded by subsequent decisions that one whose movements are monitored by use of a beeper cannot complain of a Fourth Amendment violation based on extended electronic surveillance alone, if the initial placement is made with the consent of a person with possessory interest in the property to which the beeper is attached, *United States v. Cheshire*, 569 F.2d 887 (5th Cir. 1978), *United States v. Abel*, 548 F.2d 591 (5th Cir. 1977), or if the beeper is placed during a lawful customs search in a package containing contraband, *United States v. Pringle*, 576 F.2d 1114 (5th Cir. 1978). *See also: United States v. Perez*, 526 F.2d 859 (5th Cir. 1976) (beeper placed in television set which had been exchanged for drugs by governmental agents); *United States v. Bishop*, 530 F.2d 1156 (5th Cir. 1976) (beeper placed in "bait money" stolen from bank).

The dissenting opinion to the en banc *Holmes* affirmance, 537 F.2d at 228, believed that no warrant is required. The dissent did not view the installation of the beeper as a "search" or invasion of privacy within the protection of the Fourth Amendment. It essentially viewed the attachment as a minimal intrusion upon the individual's privacy and property equivalent to the permissible warrantless inspection of a vehicle identification number on frame of an automobile, *United States v. Johnson*, 431 F.2d 441 (5th Cir. 1970) (en banc), or to the taking of paint scrapings from the exterior of an automobile parked in a police impoundment lot, *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974).

III.

In decisions subsequent to *Holmes*, the Fifth Circuit held that the express consent of the owner to the installation of electronic tracking devices in aircraft was within the third-party consent exception to the warrant requirement. *United States v. Cheshire*, 569 F.2d 887 (5th Cir. 1978) (beeper placed on plane justified by owner's consent); *United States v. Abel*, 548 F.2d 591 (5th Cir. 1977),[6] *cert. denied*, 431 U.S. 956, 97 S.Ct. 2678, 53 L.Ed.2d 273 (1977) (beeper placed on plane justified by owner's consent). *Accord United States v. Miroyan*, 577 F.2d 489 (9th Cir.), *cert. denied*, 439 U.S. 896, 99 S.Ct. 258, 58 L.Ed.2d 243 (1978). Likewise in *United States v. Conroy*, 589 F.2d 1258 (5th Cir. 1979), this court held that it was not an invalid warrantless search when a paid informant installed an electronic beeper on a vessel used by defendants in their attempt to import marijuana into the United States: "Here, Budal [the informant] was not the vessel owner, but he had a right to go aboard, and his

[6] In *Abel* the government stipulated that the installation of a beeper was a search, but the court held the search reasonable based on consent.

placement of the devices on the vessel rather than on his person does not render its introduction invalid." 589 F.2d at 12-64.

The approaches of the other circuits, when they have reached the issue, vary whether the installation of a beeper to ascertain continuously the location of an object or of a vehicle (or airplane) falls within Fourth Amendment prohibitions, and also whether a warrant is required.

The *First Circuit* has held that the installation of electronic devices to monitor the movement of a vehicle violates reasonable, although lessened, expectations of privacy of the operator of the vehicle, but that no warrant is required and no Fourth Amendment violation occurred where government agents have probable cause to believe that the operator of the vehicle is involved in the commission of a crime. *United States v. Moore*, 562 F.2d 106, 112-113 (1st Cir. 1977).[7] Of some relevance to a concern expressed by the present panel, the court further held that the warrantless insertion in a container of a legally possessed non-contraband substance (although with the consent of the chemical company prior to delivery to the suspect) may have violated the accused's Fourth Amendment rights, insofar as it continuously emitted information as to location of the chemicals *while inside a residence protected from warrantless search.* Due to record deficiency, the court therefore remanded the case for the district court to determine whether the location of the evidence "was come at not by exploitation of the illegality [the

[7] However, the First Circuit found the lessened expectancy of privacy applicable to vehicles to have no relevancy to packages which do not contain contraband. In that situation, a warrant is required. 562 F.2d at 113.

warrantless continued presence of the beeper in the home] but instead by distinct means which purge the evidence of the primary taint." *Id.* at 114.

In one opinion, the *Ninth Circuit* has held, although arguably by way of dicta,[8] that the attachment of an electronic location device to an automobile does not infringe upon any reasonable expectation of privacy and therefore does not constitute a search. *United States v. Hufford*, 539 F.2d 32 (9th Cir.), *cert. denied*, 429 U.S. 1002, 97 S.Ct. 533, 50 L.Ed.2d 614 (1976). Subsequent decisions of that circuit, however, indicated that, a warrantless installation of a beeper without consent might raise Fourth Amendment issues, but that the mere monitoring of movement *after* installation of a beeper (i. e., with consent of one entitled to give *or* pursuant to judicial authorization) does not infringe on any reasonable expectation of privacy and therefore does not constitute a search. *United States v. Miroyan*, 577 F.2d 489, 492 (9th Cir.), *cert. denied*, 439 U.S. 896, 99 S.Ct. 258, 58 L.Ed.2d 243 (1978); *United States v. Pretzinger*, 542 F.2d 517 (9th Cir. 1976).

The *Eighth Circuit* has held that monitoring the airborne *location* of an aircraft with a beeper installed through consent is not a search for purposes of Fourth Amendment. *United States v. Bruneau*, 594 F.2d 1190 (8th Cir.), *cert. denied*, ____ U.S. ____, 100 S.Ct. 94, 62 L.Ed.2d 61 (1979). It has also held that such installation without a warrant was justified by exigent circumstances and probable cause, avoiding a ruling upon whether the installation of a beeper is indeed a search or seizure within the protection of Fourth Amendment. *United States v. Frazier*, 538

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[8] The statement was arguably dicta. The warrantless insertion of the beeper into one of the drums of caffeine purchased from a manufacturer, while in the manufacturer's possession, was with his consent.

F.2d 1322 (8th Cir. 1976), *cert. denied*, 429 U.S. 1046, 97 S.Ct. 751, 50 L.Ed.2d 759 (1977).

The *Seventh* and *Tenth Circuits* did not reach a decision of the narrow issue before us, when potentially faced with the issue, either because judicial authorization based on probable cause had been obtained to install a beeper, *United States v. Washington*, 586 F.2d 1147 (7th Cir. 1978), or because the court found probable cause plus exigent circumstances justified the installation of the beeper, *United States v. Shovea*, 580 F.2d 1382 (10th Cir. 1978), *cert. denied*, 440 U.S. 908, 99 S.Ct. 1216, 59 L.Ed.2d 456 (1979), or because the beeper (lawfully implanted in a container before its delivery to the defendant) represented only a slight intrusion of privacy when emitting signals from its location within a clandestine laboratory, *United States v. Clayborne*, 584 F. 2d 346, 351 (10th Cir. 1978).[9]

The commentary in the legal writings has in general approved the *Holmes* holding that the warrantless installation of a beeper without consent and absent exigent circumstances represents a violation of an individual's Fourth Amendment property and privacy rights. Note, *Tracking Katz: Beepers, Privacy, and the Fourth Amendment*, 86 Yale L.J. 1461 (1977); Comment, *Fourth Amendment Implications of Electronic Tracking Devices*, 46 Cinn.L.Rev. 143 (1977); Note, *Search and Seizure—Does*

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[9] Later, the Tenth Circuit stated, "[f]or the purpose of our present discussion, we shall assume, without deciding, that the installation of the beepers and their use in the present case constituted a 'search' within the meaning of the Fourth Amendment." *United States v. Chavez*, 603 F.2d 143, 145 (10th Cir. 1979.) The court upheld, as satisfying Fourth Amendment requirements of probable cause, the judicial authorization of the installation and the judicial extension of the order permitting electronic surveillance.

Installation of an Electronic Tracking Device Constitute a Search Subject to the Fourth Amendment?, 22 Vill.L.Rev. 1067 (1977); Comment, *Tracking Devices and the Fourth Amendment*, 13 U.S.F.L.Rev. 203 (1978); Note, *Police Use of Sense-Enhancing Devices and the Limits of the Fourth Amendment*, 1977 U.Ill.L.F. 1167; Note, *Search and Seizure—Attachment of a Tracking Device to Automobile Constitutes a Search Subject to Fourth Amendment*, 29 Vand.L.Rev. 514 (1976). *Contra:* Marks & Batey, *Electronic Tracking Devices: Fourth Amendment Problems and Solutions*, 67 Ky.L.Rev. 987 (1979); Note, *Electronic Tracking Devices & Privacy: See No Evil, Hear No Evil, But Beware of Trojan Horses*, 9 Loy.Chi.L.J. 227 (1977). *See also* commentary that expressed no value judgment: Dowling, *"Bumper Beepers" and the Fourth Amendment*, 13 Crim.L.B. 266 (1977); Carr., *Electronic Beepers*, 4 Search and Seizure Law Report No. 4 (1977).

IV.

The conventional analysis of constitutional issues relating to beeper installation and use is based on Fourth Amendment considerations.[10] The Fourth Amendment provides:

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[10] The author notes (but does not here rely upon) his view that broader Ninth Amendment grounds may protect the individual liberty of citizens from unauthorized intrusion of governmental agents on their right to be left alone by government, whether or not a technical Fourth Amendment-prohibited search and seizure occurs. The Ninth Amendment provides: "The enumeration of certain rights shall not be construed to deny or disparage others retained by the people." The specific constitutional intent of this amendment was that the specific mention of certain rights in the first eight amendments would not be interpreted as a denial that others were protected. *Griswold v. Connecticut*, 381 U.S. 479, 488-90, 85 S.Ct. 1678, 1684-85, 14 L.Ed.2d 510 (1965) (concurring opinion); Franklin, *The Ninth Amendment as Civil Law Method and Its Implications for Republican*

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The analysis of most of the beeper decisions has usually concerned itself with whether the individual's Fourth Amendment reasonable expectation of privacy, as enunciated by *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), has been violated. *Katz* concerned electronic eavesdropping, to accomplish which no physical trespass had occurred. In overruling former decisions in which the test of Fourth Amendment violation depended *solely* upon whether a trespass had occurred, the *Katz* court enunciated a broader constitutionally protected right of a reasonable expectation of privacy than was (under the pre-*Katz* jurisprudence) determinable merely by property rights, *i. e.*, whether a trespass had occurred. *Katz* did not necessarily modify the earlier jurisprudence, however, insofar as it protected an individual against a search of his private property through the illegal entry thereupon, however minute, by governmental agents for the purpose of securing information.

Under pre-*Katz* jurisprudence, a "search" included any physical intrusion of a surveillance device into premises, by even a fraction of an inch. *Silverman v. United States*,

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Form of Government: Griswold v. Connecticut; Katzenbach v. South Carolina, 40 Tul.L.Rev. 487 (1966). *Griswold* discerned the individual's Ninth Amendment more general right to individual privacy (by reason of which the court invalidated a state statute prohibiting dissemination of birth-control information) from the penumbras emanating from various specific more limited guarantees enunciated by the first eight amendments.

365 U.S. 505, 512, 81 S.Ct. 679, 683, 5 L.Ed.2d 734 (1961). An automobile, so long as it was not abandoned, was regarded as among the constitutionally-protected "effects" of a person, whether or not it was in a person's possession or upon his premises. *Preston v. United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964). (Although somewhat modified by subsequent holdings permitting examination after lawful police seizure or impoundment, *see, e. g., Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974), *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), the core holding of *Preston* remains unchanged that the warrantless search of an automobile, in the absence of exigent circumstances, violates the Fourth Amendment. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).)

Thus, under pre-*Katz* jurisprudence the attachment (without consent of one with possessory interest) of the beeper for purposes of securing information upon the automobile lawfully possessed by Michael, even if he was not present, was a "search" of his automobile. Having been accomplished through an illegal trespass, its fruits were inadmissible as obtained in violation of the Fourth Amendment. The pre-*Katz* jurisprudence had thus drawn a line at the limits of the individual's property right, in effect holding that thus far and no further could the government go without a warrant in its investigative intrusion into his affairs.

V.

In *Katz*, as noted, the Supreme Court overruled decisions that held that the individual's right against unreasonable searches and seizures through electronic eavesdropping ended in effect at his property line. The Court

noted that "the Fourth Amendment protects people, not places," 389 U.S. at 351, 88 S.Ct. at 511, and it held that the Amendment protects against any warrantless intrusion into an activity in which the person involved has a reasonable expectation of privacy, 389 U.S. at 353, 88 S.Ct. at 512. Justice Harlan's concurring opinion provided an analysis that subsequent jurisprudence has generally followed. The new privacy standard for testing Fourth Amendment violations contains, he said, a twofold requirement: "[F]irst that a person have exhibited an actual (subjective) expectation of privacy, and second, that the expectation be one that society is prepared to recognize as 'reasonable'. . . ." 389 U.S. at 361, 88 S.Ct. at 516.

We do not read *Katz*, however, as ending Fourth Amendment protection to individuals against warrantless intrusion of the government through illegal trespass on their property, should no reasonable expectation of privacy be invaded. The Court itself noted that the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all." 389 U.S. at 350, 88 S.Ct. at 510. In holding, over Mr. Justice Black's vigorous dissent on that ground, 389 U.S. at 384, 88 S.Ct. at 518, that "the 'trespass' doctrine there enunciated [referring to former decisions] can no longer be regarded as *controlling*," 389 U.S. at 353, 88 S.Ct. at 512 (emphasis supplied), there is no indication that the Court intended to overrule its prior holdings that the Fourth Amendment protected individuals against the use of information obtained through a trespass upon their property. Rather, the intent and effect of *Katz* was to *broaden*

rather than to limit Fourth Amendment rights.[11] And, indeed, in *Alderman v. United States*, 394 U.S. 165, 176-80, 89 S.Ct. 961, 969-70, 22 L.Ed.2d 176 (1969), the Court specifically rejected the contention that the new or additional privacy rights recognized by *Katz* had somehow discarded the prior interpretations recognizing that, under the terms of the Fourth Amendment, an individual was protected against the use against him of evidence obtained through an unauthorized entry upon his property, whether or not he himself had any reasonable expectation of privacy with regard to the evidence concerned.

We are reinforced in this view by *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). There, the Court upheld the non-suppression of evidence obtained by use of a pen register, which had been installed at the telephone company's central office. This device recorded the numbers dialed from the telephone at the home of the criminally accused. Using the *Katz* reasonable expectation of privacy test, as enunciated in Mr. Justice Harlan's concurring opinion, the Court held that telephone users had no actual or subjective expectation of privacy in the numbers they dialed, and that any subjective expectation of the accused himself is not one that society is prepared to recognize as reasonable. 442 U.S. at 741-42, 99 S.Ct. at 2581-82.

Nevertheless, the holding must be viewed in its context that no physical trespass was involved. The Court itself

[11] As noted by Professor Amsterdam in *Perspectives on The Fourth Amendment*, 58 Minn.L.Rev. 349, 385 (1974):

As a doctrinal matter, it seems clear that the effect of *Katz* is to expand rather than generally to reconstruct the boundaries of fourth amendment protection. *Katz* is important for its rejection of several limitations upon the operation of the amendment, but it offers neither a comprehensive test of fourth amendment coverage nor any positive principles by which questions of coverage can be resolved. The fourth amendment is not limited to protection against physical trespass, although the pre-constitutional history of the amendment was concerned with trespasses.

noted: "The activity here took the form of installing and using a pen register. Since the pen register was installed on telephone company property at the telephone company's central offices, petitioner obviously cannot claim that his 'property' was invaded or that police intruded into a 'constitutionally protected area.' ", 442 U.S. at 741, 99 S.Ct. at 2581. This limitation upon the holding of *Smith v. Maryland* would be unnecessary if the government's view is correct that a trespass is immaterial, *i. e.*, that the test is *solely* whether the individual had a reasonable expectation of privacy in the information sought to be obtained by government agents through electronic or other sophisticated recording of non-communicative activity by a suspect.

Perhaps the strongest argument for the government's case can be based upon *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974). There, paint scrapings and the impression of a tire tread from the exterior of a suspect's car were obtained without a warrant. The Court, recognizing that a technical trespass may have occurred, applied the reasonable-expectation-of-privacy analysis, noting the lesser expectation of privacy as to the exterior of a car originally left in a public parking place. The Court held that the warrantless examination of the exterior of the vehicle was not unreasonable under the Fourth Amendment. However, it must be noted that the car had been impounded by the police after the accused's arrest, and it had then been removed to the police impoundment lot. Before upholding the subsequent warrantless search of the exterior upon probable cause as non-violative of the Fourth Amendment, the Court was obliged to find, that, initially, the vehicle itself had been constitutionally seized (upon probable cause and exigent circumstances) and impounded by the police. 417 U.S. at 592-97, 94 S.Ct. at

2470-72. *Cardwell* as a plurality decision, with four dissenters, and one Justice apparently concurring in the result only because the accused had had a full and fair opportunity to litigate his claim in the state courts and should not be afforded federal collateral review, 417 U.S. at 596, 94 S.Ct. at 2472 (Powell, J., concurring).

We do not believe that *Cardwell* is authority for the further proposition that the police may accomplish the acts of a warrantless exterior examination through technical trespass, not only upon vehicles lawfully impounded by them, but also upon any vehicles found in the public street. Likewise, the momentary invasion of the exterior of the vehicle, similar to the acts of a passerby, are minimal by way of search, as compared to the lengthy physical intrusion of a beeper that in effect appropriates private property for the unintended use of providing guidance to the government of every movement of the individual in the vehicle. The installation of the beeper involves a far broader, more extensive invasion of the individual's privacy than that with which *Cardwell* was concerned, and the Copernican difference in degree and duration of the effects of the trespass alone might distinguish *Cardwell's* holding as inapplicable to the present facts.

In rejecting the government's argument that *Cardwell* and *Smith* should be extended even further—so as to hold justifiable, because of the public interest in suppressing crime, the minute monitoring of an individual's movements over four (or one or twenty) days made possible by an illegal trespass upon his property, we should bear in mind Mr. Justice Bradley's admonition in his opinion for the Court almost a century ago in *Boyd v. United States*, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746 (1886), that is worth repeating here:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

VI.

We thus reject the government's persuasively argued contention that the test here for Fourth Amendment interests begins and ends with an inquiry as to whether the individual had any reasonable expectation of privacy in his movements through use of the vehicle *following* installation of the beeper. As noted, we cannot ignore as irrelevant the important value of individual ownership of private property free of unauthorized intrusion thereupon by governmental agents that is recognized by various amendments in our Bill of Rights, pertinently here the Fourth, despite the lesser expectation of privacy as to the exterior of a vehicle. Nor can we regard the intrusion by trespass, with consequences extending over days of continued attachment of the beeper, as other than generically different in degree and kind than the barely-sustained, virtually momentary trespass in *Cardwell*.

We also recognize the prevalent jurisprudence which affords no constitutional protection against following a vehicle by visual surveillance (or even by electronic surveillance, when the beeper is installed with consent, *see*,

e. g., footnote 5 *supra*), a function that the warrantless installation of a beeper for the most part furthers. Nevertheless, insofar as an individual's (and society's) reasonable expectation of privacy is a relevant factor, we agree with the original *Holmes* panel decision that the warrantless and unauthorized installation of a beeper intensifies the degree of surveillance—following the vehicle indefinitely and even indiscriminately into closed precincts (*e. g.*, a garage, a fenced estate) not visually observable which may have Fourth Amendment protection against governmental intrusion—to such an extent that it constitutes a violation of Fourth Amendment rights of privacy.

As the *Holmes* panel opinion, authored by Circuit Judge Bryan Simpson, states:

> In contending that a citizen cannot expect his movements on public roads to remain private, the government assumes that the nature of the information it seeks to uncover controls whether or not a search has occurred. Thus, it tries to distinguish the beeper in the instant case from the phone tap at issue in *Katz* because the latter picks up conversation, an area in which, according to the government, a citizen has an extraordinary expectation of privacy.
>
> The protections of the Fourth Amendment, however, do not depend entirely upon the nature of what is seized.
>
> . . . . .
>
> The real question, then, in cases of this type and the proper focal point for inquiry is whether the government, in searching out information not otherwise available, invades an individual's "right of personal security, personal liberty, and private property," *Boyd v. United States*, 1886, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746, 751, and violates "the privacy upon which he justifiably relied." *Katz*, supra, 389 U.S. at 353, 88 S.Ct. at

512, 19 L.Ed.2d at 583. By this approach, courts are able to distinguish visual surveillance from electronic surveillance, eavesdropping from wiretapping, a plain view from a breaking and entering.

No rational basis occurs to us for distinguishing the violation of the expectation of privacy involved in the installation of a "beeper" on a car, in order to trace its movement, from the placing of a tap on the outside of a telephone booth in order to overhear and record conversations, *Katz*, supra. In addition, of course, the "beeper" installation was accomplished by an actual trespass.

. . . . .

A person has a right to expect that when he drives his car into the street, the police will not attach an electronic surveillance device to his car in order to track him. Although he can anticipate visual surveillance, he can reasonably expect to be "alone" in his car when he enters it and drives away.

521 F.2d 865-66 (footnotes omitted).

The placement by trespass of the beeper makes possible the continuous and indefinite tracing of the individual's movements, wherever he goes. It permits surveillance far beyond any ordinary powers of observation about which citizens may reasonably know, as the government inferentially admits when it contends that placement of the beeper was necessary in order to effectuate continuous surveillance.

We believe that the trespass so invades individual and societal reasonable expectation of privacy that the unauthorized installation of a beeper on private property, absent both probable cause and exigent circumstances, requires judicial authorization, which may pass upon the

purpose and cause for this intrusion upon an individual's property and privacy, and which may supervise its duration. The Fourth Amendment requires no less.

Conclusion

Accordingly, we AFFIRM the order of the district court, which granted the defendant's motion to suppress certain evidence as unconstitutionally seized.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

UNITED STATES OF AMERICA VS BARRY DEAN MICHAEL, et al.	CRIMINAL ACTION NO. 79-86A

MAGISTRATE'S REPORT AND RECOMMENDATION

Defendant, Barry Dean Michael, has been charged in a two count indictment with unlawfully manufacturing and possessing with the intent to distribute a controlled substance, methylenedioxyamphetamine (MDA), and a conspiracy to distribute the same in violation of 21 U.S.C. § 841(a)(1); 846; and 18 U.S.C. § 2. Following the arraignment of defendant and pretrial conference with this Magistrate, defendant's counsel filed a motion for the suppression of evidence seized from the Jeep driven by co-defendant Christie incident to her arrest by state authorities for the sale of a pound of MDA, and evidence seized from a warehouse, located with the assistance of an electronic transmitter installed on the van driven by defendant. Defendant's counsel has also challenged the sufficiency of the search warrant used to gain entrance into the warehouse contending that the search warrant should be invalidated and the evidence seized pursuant to those warrants should be suppressed. Pursuant to 28 U.S.C. § 636(b) and this Court's Local Rule 290, an evidentiary hearing was held on this motion on May 21, 1979. Defendant's motion for an independent crime lab

analysis of the seized controlled substances was also heard at that time.

MOTION TO SUPPRESS

The majority of the testimony elicited at the evidentiary hearing regarding this motion was given by United States Drug Enforcement Administration Special Agent James C. Sweat. (TR 15). The DEA's investigation was initiated in early 1978 when the agency was alerted by a chemical supply company in Atlanta that an Andrew Welch was purchasing large quantities of glassware and equipment of the type utilized in "clandestine" laboratory operations. (TR 16). Further investigation revealed that one of the chemicals was muriatic acid. (TR 19). A forensic chemist of the DEA informed Agent Sweat that muriatic acid is used in the manufacture of MDA. (TR 19). Employees at Burris also informed Agent Sweat that an individual named Mike Thompson purchased a quantity of muriatic acid for Andrew Welch on July 20, 1978. (TR 20-22).

In July 1978, co-defendant Christie was arrested by the Georgia Bureau of Investigation for the attempted sale of one pound of MDA. It has been stipulated in this case that Ms Christie was arrested in a motel room. (TR 146). The Jeep she was driving, located in the motel parking lot, was seized and an inventory search of its contents was made. Included in the evidence taken from the Jeep was a receipt from the Norda Corporation of New Jersey, for the sale of 500 pounds of Iso-safrole, issued to Mike Johnson of the Chemical Manufacturing Company located at 12 Baker Street, Philadelphia, Pennsylvania. The DEA office in Philadelphia reported that there was neither a chemical manufacturing company of that name

nor a 12 Baker Street. (TR 23-24, 63).

Defendant Michael testified at the hearing about his proprietary interest in the Jeep driven by Christie. Although the Certificate of Title, Title Application form and Tag Receipt (Government Exhibits 3, 4 and 5), all indicate that Andrew Welch is the sole owner of the Jeep, Michael states that he contributed $2,000 or one half, of the purchase price. Furthermore, he claims to have had access to the vehicle and to have stored personal belongings in it. Michael also acknowledged that Welch purchased the Jeep and was the primary user. (TR 129-133).

The information concerning the Norda receipt was forwarded by the GBI to Agent Sweat in late July or early August 1978. On August 8, 1978, the Burris Chemical Company advised Agent Sweat that another chemical purchase was to be made by a Mike Thompson. On August 10, 1978 Agent Sweat accompanied by Agent Smith surveiled the Burris Chemical Company and observed the individual identified as Mike Thompson purchase a quantity of chemicals. This was the first instance where Agent Sweat saw Mike Thompson, also identified as the defendant Barry Dean Michael. (TR 25-26, 128).

The purchaser of the chemicals was trailed by Agent Sweat from the Burris Chemical Company to the Georgia Tech campus and then subsequently to a public parking lot behind a pizza parlor, on North Avenue in Atlanta. While the defendant was away from his van, Agent Smith attached a remote transmitter to the bottom of the chassis. Four other DEA agents were also on the scene at this time. (TR 51). The van was left unattended for approximately forty-five minutes by the defendant. Agent Sweat testified that he did not obtain nor seek a warrant for this "beeper" emplacement. The defendant was then

followed to Charlie Brown Airport and finally to a residence on Lenox Road. (TR 28-33). An investigation revealed that Mike Thompson and Defendant Barry Dean Michael had the same address. (TR 23-24). With the assistance of Georgia Tech Police Department, Agent Sweat discovered that this individual appeared to be the defendant Barry Dean Michael. (TR 20-22, 36). A connection between Barry Dean Michael and Andrew Welch was drawn because Andrew Welch had used Michael as a reference. (TR 57). The van was registered to Wade Ford but was leased to Barry Dean Michael. (TR 47, 55).

On the following day, August 11, 1978, Barry Dean Michael driving the van which had the "beeper" was followed to Tucker, Georgia, where he was observed unloading materials from the van to a rented mini-warehouse. (TR 33-35). The lessee of this warehouse was an individual named Tom Watson. Employees at the warehouse told Agent Sweat that "Tom Watson" was unable to show any identification at the time he rented the space. Agent Sweat further determined that Tom Watson and Barry Dean Michael had the same post office box. (TR 83-84).

On three separate occasions, Agent Sweat accompanied by other agents of the Drug Enforcement Administration entered this warehouse in Tucker to search the premises. A scraping from glassware found in the mini-warehouse on August 15 proved negative for MDA residue. The August 18 search of the premises produced positive indications of MDA residue. A third search warrant was obtained on October 6, at which time the seizure of the stored items was made. (TR 36-42).

Defendant has moved for the suppression of the Norda receipt found in the Jeep by the GBI. A proprietary

interest has been asserted by the defendant in his effort to establish standing. Evidence in the record rebuts Michael's contention that he possesses a one-half interest in the vehicle. Government Exhibits 3, 4 and 5 indicate that co-defendant Welch is the sole owner of record. Furthermore, Michael did not accompany Christie to the motel where the Jeep was seized, nor was he with the vehicle at the time of the arrest.

While ownership of the seized property is relevant in assessing defendant's standing to challenge the search, it is not necessarily determinative. *United States v. Dyar*, 574 F.2d 1385, 1390 (5th Cir. 1978). *United States v. Nunn*, 525 F.2d 958, 959 (5th Cir. 1976). Property rights in the absence of reasonable expectations of privacy will not support a Fourth Amendment claim. *Dyar, supra; United States v. Hunt*, 505 F.2d 431 (5th Cir. 1975).

In the instant case, the evidence fails to conclusively establish Michael's proprietary interest in the vehicle. This uncertainty jeopardizes his standing under *Brown v. United States*, 411 U.S. 223 (1973). Moreover, defendant's expectation of privacy is also suspect considering his limited control and use of the vehicle. Accordingly, Michael's motion to suppress this portion of the evidence should be denied.

Defendant has also moved to suppress the evidence seized from the warehouse on the ground that its discovery is a product of a search conducted in violation of his Fourth Amendment Rights. *Wong Sun v. United States*, 371 U.S. 471 (1963). The facts in this case indicate that Agent Sweat was notified on August 8, 1978, that defendant would be coming to the Burris Chemical Company to pick up an order of acetone in the early afternoon of that day. Agent Sweat along with five other agents fol-

lowed the defendant for several hours while he went to the Tech Campus, a restaurant, and Charlie Brown Airport. At no time was there any attempt on the part of the agents to secure a warrant for the remote transmitter. Particularly through the aid of this "beeper" agents were able to maintain surveillance of the van and were eventually led to the warehouse where the evidence was stored. (TR 82-83).

The Fifth Circuit in *United States v. Holmes*, 521 F.2d 859 (5th Cir. 1975, *aff'd en banc* 537 F.2d 227 (5th Cir. 1976), has held: (1) that the use of the beacon to monitor the movements of a vehicle is a search subject to the Fourth Amendment; (2) that such search is illegal because of the failure to obtain a warrant for its installation; and (3) that evidence constituting the "fruit" of the initial search should be suppressed. 537 F.2d at 227-228.

The facts in the *Holmes* case are remarkably similar to the case at bar. More specifically, both vehicles were left in a public parking lot unattended while a DEA agent installed a battery operated beacon to the underside of the vehicle. Electronic surveillance enhanced the agents ability to track the vehicle. The agents were led to the site of the illegal goods with the aid of the beacon. And, the discovery of the contraband was not made until several days after the installation of the "beeper". The most apparent difference between the two situations is that aerial surveillance was necessary to reestablish visual ground observation of the *Holmes* vehicle.

The *Holmes* court expanding upon *Katz v. United States*, 389 U.S. 347 (1967), holds that an automobile comes within the scope of privacy even though it is found in an area accessible to the public. 521 F.2d 859 at 865-7.

No rational basis occurs to us for distinguishing the

> violation of the expectation of privacy involved in the installation of "beeper" on a car, in order to trace its movement from the placing of a tap on the outside of a telephone booth in order to overhear and record conversation, *Katz, supra*. In addition, of course, the 'beeper' installation was accomplished by an actual trespass. . . .
>
> Evidence seized during an unlawful search is subject to exclusion. That evidence seized in this case was not unearthed at the time of the initial invasion is of no moment. The exclusionary prohibition extends as well to the indirect as well as the direct products of such invasions.

A person has a right to expect that when he drives his car into the street, the police will not attach an electronic surveillance device to his car in order to track him. Although he can anticipate visual surveillance, he can reasonably expect to be "alone" in his car when he enters it and drives away. 521 F.2d at 866.

The evidence that was seized from the warehouse was the product of an unlawful search and therefore subject to exclusion. This Court recommends that the evidence be suppressed since the evidence was seized from the warehouse as a direct product of the unlawful installation of the beeper. Without the aid of the "beeper", Agent Sweat would not have been directed to the warehouse and would not have discovered the chemicals and chemical glassware. The evidence seized through a warrantless invasion of defendant's privacy should therefore be suppressed.

The cases cited by the Government to distinguish the holding in *Holmes* all lie outside the Fifth Circuit. This Court has been unable to find any cases that substantially alter the holding of *Holmes*. The cases which distinguish *Holmes* speak of "beepers" placed on contraband *United*

States v. Emery, 541 F.2d 887, 889 (5th Cir. 1976), or personal property, in the rightful possession of the Government at the time the "bug" was inserted. *United States v. Perez*, 526 F.2d 859, 863 (5th Cir. 1976). One case was written prior to the *Holmes en banc* decision and distinguished its holding on the basis that *Holmes* was unsettled. *United States v. Hufford*, 539 F.2d 32 (9th Cir. 1976). Finally, the Ninth Circuit later expressed a desire to adopt the *Holmes* standard but was restrained by controlling Ninth Circuit precedent. *United States v. Curtis;* 562 F.2d 1153, 1156 n.2. (9th Cir. 1977). The Government has also failed to point out any exigent circumstances which would merit the installation of a remote transmitter without prior judicial authorization.

In light of this recommendation that the evidence seized from the warehouse be suppressed, discussion of the sufficiency of the search warrants will be reserved.

MOTION FOR INDEPENDENT LAB ANALYSIS

Defendant seeks a Court order permitting an independent lab analysis of evidence seized. Extensive testimony was taken on the necessity for such an examination during the evidentiary hearing on the Motion to Suppress. Prior to the hearing, however, defense counsel acknowledged that the identical motion had already been considered and rejected by the District Court. *See, United States v. Mitchell*, CR 78-26A (N.D. Ga. 1978) (Henderson J.). This matter is presently pending before the Fifth Circuit. This Court recommends that defendant's motion be denied and that the *Mitchell* decision be adopted as the Order in the above styled case.

MOTION FOR EARLY DISCLOSURE OF JENCKS ACT MATERIAL

Defendant has moved for an early disclosure of Jencks Act material so as to expedite the trial proceedings. While the Government is not required to furnish such material prior to the testimony of the witness, it is the recommendation of this Magistrate that the material be furnished to the defense counsel at least twenty-four hours prior to the time the witness is to be called by the Government.

CONCLUSION

In all regards this case is believed ready for trial and it is so certified at this time.

It should be noted that Defendant Michael was arraigned and entered a plea of not guilty on April 11, 1979. He is not in custody at this time on the charges in this case and therefore, under this Court's Speedy Trial Paln and the Speedy Trial Act it must be tried within 80 days of his plea of not guilty plus excludable time. The trial must commence within 80 days from April 11, 1979, plus 32 days excludable time, or on or before August 1, 1979. Insofar as the co-defendants are concerned, Andrew Welch has been severed from this action and his case will be tried in a Florida District Court; Alfred McGuinniss has entered a guilty plea and was scheduled for sentencing on June 1, 1979; and Janice Christie has submitted a Nolo Contendere plea for consideration by the District Court. Let a copy of this Report and Recommendation be served by mail upon counsel for the parties.

AND IT IS SO REPORTED AND RECOMMENDED this 15th day of June, 1979.

/s/ JOHN E. DOUGHERTY
JOHN E. DOUGHERTY
UNITED STATES MAGISTRATE

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA vs. BARRY DEAN MICHAEL a/k/a Mike Thompson a/k/a Mike Johnson	CRIMINAL NO. CR79-86A

ORDER

Defendant Barry Dean Michael is charged in a two-count indictment with unlawfully manufacturing and possessing with the intent to distribute a controlled substance, methylenedioxyamphetamine (MDA), and with conspiracy to distribute the same in violation of 21 U.S.C. §§ 841(a)(1), 846 and 18 U.S.C. § 2. This action is now before the court on the magistrate's report and recommendation that defendant's motion to suppress evidence seized from a Jeep driven by co-defendant Christie incident to her arrest by state authorities for the sale of a pound of MDA and for independent lab analysis be denied, that his motion to suppress evidence seized from a warehouse, which was located with the assistance of an electronic transmitter installed on the van driven by defendant be granted, and Jencks Act material be furnished to defense counsel at least twenty-four hours prior to the time the witness is to be called by the Government. Both parties have filed various objections to these determinations.

Having read and considered the report, the court hereby

ADOPTS the same as its opinion and order and DENIES defendant's motions to suppress the evidence obtained in the search of the Jeep and for independent lab analysis and GRANTS defendant's motion to suppress the evidence obtained as a result of the installation of the electronic transmitter. The court concludes, as did the magistrate, that the propriety of the search at issue in the latter motion is governed by *United States v. Holmes*, 521 F.2d 859 (5th Cir. 1975), *aff'd by an equally divided court en banc*, 537 F.2d 227 (5th Cir. 1976); since, in the instant action, the Government never obtained a warrant for the installation of the "beeper", the search of the van was illegal under *Holmes*, and the evidence seized from the warehouse, the "fruit" of this illegal search, is thus subject to suppression under *Wong Sun v. United States*, 371 U.S. 471 (1963). Finally, the court RECOMMENDS that the Jencks Act material be provided as suggested by the magistrate.

So ORDERED, this 12th day of July, 1979.

/s/ NEWELL EDENFIELD
NEWELL EDENFIELD
United States District Judge

Office-Supreme Court, U.S.
FILED
AUG 5 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-112

In the Supreme Court of the United States

OCTOBER TERM, 1980

BARRY DEAN MICHAEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the warrantless installation and monitoring of an electronic tracking device (a "beeper") on the exterior of his vehicle violated his Fourth Amendment rights.

Petitioner was charged, in a two-count indictment returned in the United States District Court for the Northern District of Georgia, with unlawfully manufacturing and possessing a controlled substance, methylenedioxyamphetamine, with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and with

conspiracy to distribute it, in violation of 21 U.S.C. 846.

Following a pretrial hearing, the district court sustained petitioner's motion to suppress evidence seized from a warehouse under a search warrant. It did so on the ground that this evidence had been discovered by Drug Enforcement Agents through the warrantless installation of a beeper on the exterior of petitioner's rented van. Initially, a panel of the court of appeals, relying in part on the panel opinion in *United States* v. *Holmes*, 521 F.2d 859 (5th Cir. 1975), affirmed the district court (Pet. App. 1b-21b; 622 F.2d 744 (1980)). On rehearing en banc, the court of appeals, in a 16 to 8 decision, reversed the suppression order and remanded for trial (Pet. App. 1a-47a; 645 F.2d 252 (1981)).

Petitioner contends (Pet. 5-12) that the court of appeals erred in suppressing the evidence that derived from the use of the "beeper." Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress the evidence. If petitioner is acquitted following a trial on the merits, his claims will be moot. If, on the other hand, petitioner is convicted, he will then be able to present his present contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *American Construction Co.* v. *Jack-*

sonville, T. & K.W. Ry., 148 U.S. 372, 384-388 (1893); see *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916).[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE
Acting Solicitor General

AUGUST 1981

[1] Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

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UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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No. 81-112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BARRY DEAN MICHAEL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The government opposes certiorari in this matter, essentially saying that the decision below, being on an interlocutory appeal (of the government), has no over-all importance and that the case may go away. Petitioner submits that the case is of utmost importance, as outlined in his petition, and that moreover the government's position is basically opposite of what it said in the court below.

A Fifth Circuit rule (Local Rule 16.2) offers two alternative certificates in asking for a rehearing *en banc:* (1) that the decision of the panel is contrary to other

Fifth Circuit or Supreme Court decisions, or, (2) that "based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance." The three lawyers handling the case below certified in applying for rehearing *en banc* that the second situation applied. Petitioner in his initial Brief of Appellee (p. 7) states that "[the Fifth Circuit] will likely have to decide this case *en banc*" (and remember petitioner was appellee at the time).

The government's position in the Fifth Circuit's *en banc* proceeding (Supp. Br. p. 5) was that "we believe that this [*en banc*] Court can reverse the panel decision [on the facts] without having to decide any of the *novel* constitutional questions the case *otherwise* poses" (emphasis supplied). Of course, as we now know, the Fifth Circuit *en banc* court rejected that suggestion and did go into "the novel constitutional questions," coming out with three majority opinions and two minority ones. And then there is the wide variety of opinions on the "novel" questions throughout the federal system.

Clearly this case comes under at least a couple of exceptions regarding certiorari on interlocutory proceedings that are discussed in *Stern and Gressman*, § 4.19 ("some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari;" "a conflict on a question of law with another court of appeals or a highest state court"). It seems to satisfy the reservation expressed by Justice Rehnquist in *Miroyan v. United States*, 439 U.S. 1338 (1978). The Fifth Circuit *en banc* decision is being discussed in the cases throughout the federal system. Totally opposite results are going to be achieved in criminal cases in different parts of the country. One would

think that the Solicitor General would want this area clarified; it seems obvious that the circuits will not be able to resolve the issues.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served three copies of the within and foregoing Petitioner's Response to Memorandum for the United States In Opposition upon the Solicitor General, U.S. Department of Justice, Washington, D. C. 20053; and upon the U.S. Attorney, 75 Spring Street, Atlanta, Georgia 30303, by depositing same in the United States Mail in properly addressed envelopes with adequate postage thereon. I further certify that all parties required to be served have been served.

This the _____ day of August, 1981.

ALBERT M. HORN